Supreme Court, U.S.
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No. 02 660

In The
Supreme Court of the United States

CLIFFS SYNFUEL CORP.,

Petitioner,

v.

GALE A. NORTON, Secretary, U.S. Department of the Interior; KATHLEEN B. CLARKE, Director, Bureau of Land Management; SALLY WISELY, Director, Utah State Office, Bureau of Land Management; and the UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether this Court's unanimous holding in *Wilbur v. U.S. ex rel. Krushnic*, 280 U.S. 306 (1930), that an oil shale claim is "maintained" within the meaning of the Savings Clause in the Mineral Leasing Act, 30 U.S.C. § 181 *et seq.*, by the resumption of assessment work prior to the initiation of a government contest, was properly overruled by the Tenth Circuit through its interpretation of this Court's holding in *Hickel v. Oil Shale Corp.*, 400 U.S. 48 (1970), that the Department of the Interior has jurisdiction to challenge an oil shale claim for nonperformance of assessment work as long as the challenge is filed during a lapse in the work?

2. Whether the Department of the Interior may reverse its decades-long interpretation of the statutes it is charged with administering and this Court's holdings, under which hundreds of oil shale claims were patented, and apply its new interpretation retroactively so as to extinguish vested oil shale claims?

LIST OF PARTIES

Petitioner: Cliffs Synfuel Corp. Pursuant to Supreme Court Rule 29.6, Cliffs Synfuel Corp. declares that the only publicly held company that owns any interest in Cliffs Synfuel Corp. is Cleveland-Cliffs, Inc.

Respondents: Gale A. Norton, Secretary, U.S. Department of the Interior; Kathleen B. Clarke, Director, Bureau of Land Management; Sally Wisely, Director, Utah State Office, Bureau of Land Management; and the U.S. Department of the Interior.

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PETITION FOR WRIT OF CERTIORARI

Cliffs Synfuel Corp. ("Cliffs") hereby petitions this Court for a *writ* of *certiorari* to review the judgment of the U.S. Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit from which review is sought is reported at 291 F.3d 1250 (10th Cir. 2002) and is reproduced at App. 1-24. The opinion of the U.S. District Court for the District of Utah is reported at 147 F.Supp.2d 1118 (D. Utah 2001) and is reproduced at App. 25-40. The decision of the Interior Board of Land Appeals ("IBLA") from which judicial review was sought is reported at 146 IBLA 353 (1998) and is reproduced at App. 41-54. The decision of the Administrative Law Judge ("ALJ"), Office of Hearings and Appeals, U.S. Department of the Interior, from which the appeal to the IBLA was taken, *United States v. Cliffs Synfuel Corp*, UTU-75522, *slip op.* (1998), is reproduced at App. 55-71.

JURISDICTION

The judgment of the Tenth Circuit was entered on May 31, 2002. App. 1. On July 15, 2002, Cliffs timely filed a Petition for Rehearing *En Banc*. On August 1, 2002, the Tenth Circuit denied Cliffs' Petition for Rehearing *En Banc*. App. 72-73. Pursuant to Supreme Court Rule 13.3, this Petition is timely filed within 90 days of the Tenth Circuit's denial of Cliffs' Petition for Rehearing *En Banc*.

Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction to review the judgment of the Tenth Circuit.

STATUTES INVOLVED

This Petition involves the statutory "Right to Resume Work" found in the General Mining Law of 1872 ("Mining Law"), 30 U.S.C. § 22 *et seq.*, which provides:

> On each claim located after the 10th day of May 1872 . . . and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. . . . [U]pon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, *provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.*

30 U.S.C. § 28 (emphasis added); App. 74-75.

This Petition also involves the Savings Clause in the Mineral Leasing Act ("Leasing Act"), 30 U.S.C. § 181 *et seq.*, which provides:

> The deposits of . . . oil shale . . . in lands valuable for such minerals, shall be subject to disposition only in the form and manner provided in [the Leasing Act] . . . except as to valid claims existent [on February 20, 1920] and thereafter maintained in compliance with the laws under which

initiated, which claims may be perfected under such laws, including discovery.

30 U.S.C. § 193; App. 76.

STATEMENT OF THE CASE

Cliffs owns four oil shale mining claims encompassing approximately 520 acres in Uintah County, Utah. App. 55-56. The claims were located in 1917, based upon the discovery of a valuable deposit of oil shale on each claim. App. 57. On March 22, 1989, Cliffs filed, pursuant to the Mining Law, a patent application for the claims with the U.S. Department of the Interior ("Department"). *Id.* In the fall of 1992, Cliffs properly published and noticed its patent application and paid the statutory fees. *Id.* Shortly thereafter, on October 9, 1992, the Department issued the First Half of Mineral Entry Final Certificate ("FHFC") to Cliffs. *Id.* Issuance of the FHFC evidenced that equitable title had vested in Cliffs and that the only remaining administrative action needed to be performed by the Department was the verification of a valuable discovery. *United States v. Whittaker (On Reconsideration)*, 102 IBLA 162, 166 (1988). Issuance of the FHFC also established that Cliffs was relieved of any further requirement to perform assessment work. *See*, 43 C.F.R. § 3851.5 (1992).

In 1996, the Department filed a contest against all four of Cliffs' claims alleging lack of discovery and nonperformance of assessment work. App. 55, 57. On the basis of these charges, the Department asked that all four claims be declared invalid and canceled. App. 55. On December 15-16, 1997, an evidentiary hearing was held before the ALJ. App. 56. On April 7, 1998, the ALJ ruled that all four

claims met the standards for "discovery," both as of February 25, 1920, and as of the present and, thus, rejected the Department's "discovery" challenges. App. 58-63.

With respect to assessment work, the ALJ found that work had been performed on the claims for the assessment year ending December 31, 1918, through the assessment year ending July 1, 1930, and for the assessment year ending September 1, 1978, through the assessment year ending September 1, 1992. App. 64. Because assessment work had resumed on the claims prior to the filing of the Department's contest, Cliffs argued that the claims had been preserved by the statutory "Right to Resume Work" and, thus, "maintained" within the meaning of the Savings Clause in the Leasing Act. App. 67-69. Cliffs based its argument on this Court's unanimous holding in *Wilbur v. U.S. ex rel. Krushnic*, 280 U.S. 306, 317-318 (1930), wherein this Court held that an oil shale claim is "maintained" within the meaning of the Savings Clause in the Leasing Act by the resumption of assessment work "unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened" during the lapse in work. App. 69. In rejecting Cliffs' argument, the ALJ stated that his ruling was controlled by the IBLA's decision in *United States v. Herr*, 130 IBLA 349 (1994), which interpreted this Court's decision in *Hickel v. Oil Shale Corp.*, 400 U.S. 48 (1970), to have abrogated the statutory "Right to Resume Work" with respect to oil shale claims. App. 68-69.

Cliffs timely appealed the ALJ's decision to the IBLA, again asserting that the statutory "Right to Resume Work" was part of the Mining Law in 1977, *i.e.*, the year assessment work resumed, and continues to be part of the Mining Law. App. 45-46. On November 23, 1998, the IBLA

affirmed the ALJ's decision based solely upon its earlier decision in *Herr*: "[w]e stand by our observation in [*Herr*] that after [*Hickel*] the resumption doctrine was no longer applicable to oil shale claims." App. 52-53.

On March 3, 1999, Cliffs sought judicial review of the IBLA's decision in the U.S. District Court for the District of Utah. App. 30. The District Court first ruled that the language in 30 U.S.C. § 28 is clear, *i.e.*, a claimant may preserve his claim by resuming assessment work prior to the relocation of the claim by a rival locator. App. 32-33. The District Court then reviewed *Hickel* and concluded that the statutory "Right to Resume Work" was not an issue in that case. App. 33-35. Thus, the District Court rejected the IBLA's contention that *Hickel* effectively repealed the statutory "Right to Resume Work" with respect to oil shale claims, noting that this Court "knows how to say a statute is invalid." App. 35. Accordingly, the District Court held that Cliffs' resumption of assessment work in 1977, before the initiation of a Department's contest, had "maintained" the claims within the meaning of the Savings Clause in the Leasing Act. App. 40. Thereupon, the District Court vacated the IBLA's decision and directed the Department to diligently process Cliffs' patent application. *Id.*

On May 31, 2002, the Tenth Circuit reversed. It first rejected the basis of the IBLA's decision, *i.e.*, that *Hickel* had abrogated the statutory "Right to Resume Work" with respect to oil shale claims. App. 18. Nonetheless, the Tenth Circuit ruled that the failure to comply substantially with the assessment work requirement results in an automatic forfeiture of an oil shale claim, even if assessment work is resumed prior to a government contest. App. 21-22. Based upon this ruling, the Tenth Circuit held that Cliffs' oil

shale claims had been forfeited at some unknown time "long before . . . assessment work [was resumed] in 1977" and long before the Department initiated its contest in 1996.[1] App. 22.

REASONS FOR GRANTING THE PETITION

This Court should grant this Petition for three important reasons. First, the Tenth Circuit effectively overruled *Krushnic* by fundamentally misreading this Court's decision in *Hickel*. As a result, this Petition should be granted to ensure respect of this Court's holding in *Krushnic*. Second, the Tenth Circuit's decision may have effectively extinguished all remaining unpatented oil shale claims, which cover more than 30,000 acres within the Tenth Circuit. Finally, this Petition should be granted because the Tenth Circuit violated this Court's well-established precedent by according deference to the Department's new interpretation and by applying that new interpretation retroactively so as to extinguish vested property rights.

[1] On July 15, 2002, Cliffs timely filed a Petition for Rehearing *En Banc*, which was denied on August 1, 2002. App. 72-73.

I. THE TENTH CIRCUIT EFFECTIVELY OVERRULED THIS COURT'S UNANIMOUS HOLDING IN *KRUSHNIC*.

A. In *Krushnic*, This Court Held That An Oil Shale Claim Is "Maintained" Within The Meaning Of The Savings Clause In The Leasing Act By The Resumption Of Assessment Work Prior To The Initiation Of A Government Contest.

For a claimant to hold an unpatented mining claim, the Mining Law requires that "$100 worth of labor shall be performed or improvements made during each year." 30 U.S.C. § 28. If the claimant fails to perform the required work, the land is open to location by rival locators as if no prior claim existed. *Id.* However, if the original claimant resumes work before a rival locator makes location, the original claim is preserved:

> [U]pon a failure to comply with [the labor requirements], the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, *provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.*

Id.; App. 74-75 (emphasis added). The ability of the original claimant to resume work and, thereby, preserve the claim is commonly referred to as the "resumption doctrine," but is more accurately characterized as the statutory "Right to Resume Work." Moreover, upon the completion of $500 worth of work and the payment of the statutory fees, a claimant is entitled to a patent, which

conveys fee simple title to the surface and the minerals within the boundaries of the claim. 30 U.S.C. §§ 29, 37.

Prior to 1920, oil shale was a locatable mineral under the Mining Law. On February 25, 1920, Congress passed the Leasing Act, which prohibited the subsequent location of oil shale claims. Thereafter, oil shale deposits could only be leased from the United States. 30 U.S.C. § 181. However, the Leasing Act contains a "Savings Clause" for preexisting oil shale claims, which provides:

> The deposits of . . . oil shale . . . in lands valuable for such minerals, shall be subject to disposition only in the form and manner provided in [the Leasing Act] . . . except as to valid claims existent [on February 20, 1920] *and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.*

30 U.S.C. § 193; App. 76 (emphasis added).

Following the passage of the Leasing Act, the Department began challenging oil shale claims for nonperformance of assessment work. For example, in *Emil L. Krushnic*, 52 I.D. 282 (1928), the Department rejected an application for patent to an oil shale claim for nonperformance of assessment work, even though assessment work had been resumed prior to the Department's contest. In sustaining the actions of the Department, the Secretary held (as did the Tenth Circuit in the instant case) that all rights to the claim were automatically forfeited upon the lapse in assessment work and that the claim could not be preserved by the resumption of assessment work prior to the Department's contest. *Emil L. Krushnic (On Rehearing)*, 52 I.D. 295 (1928).

Thereafter, this Court granted *certiorari* to consider whether the Leasing Act extinguished the statutory right of an owner of an oil shale claim to preserve his claim by resuming assessment work prior to initiation of a government contest. *Wilbur v. U.S. ex rel. Krushnic*, 280 U.S. 306, 316 (1930). In resolving the issue, this Court reiterated that an unpatented mining claim is a constitutionally protected property right:

> [W]hen the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. *The claim is property in the fullest sense of that term*; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is 'real property,' subject to the lien of a judgment recovered against the owner in a state or territorial court.

Id. (quoting *Belk v. Meagher*, 104 U. S. 279, 283 (1881)) (emphasis added).

This Court then addressed the effect the Leasing Act had upon the statutory "Right to Resume Work." Based upon the plain meaning of the words in the Savings Clause, this Court held:

> It is not doubted that a claim initiated under [30 U.S.C. § 28] could be maintained by the performance of annual assessment work of the value of $100; and we think it is no less clear that, after failure to do assessment work, the owner equally *maintains* his claim, within the meaning of the Leasing Act, *by a resumption* of work, unless at least some form of challenge on behalf of the United States to the valid existence of the claim

> has intervened; for as this court said in [*Belk v. Meagher*, 104 U.S. at 283]: 'His rights after resumption were precisely what they would have been if no default (that is, no default in the doing of assessment labor) had occurred.' Resumption of work by the owner, unlike a relocation by him, is an act not in derogation, but in affirmance, of the original location; and thereby the claim is 'maintained' no less than it is by performance of the annual assessment labor. Such resumption does not *restore* a *lost* estate [*see*, *Knutson v. Fredlund*, 106 P. 200, 202 (Wash. 1910)]; it *preserves* an *existing* estate. We are of opinion that the Secretary's decision to the contrary violates the plain words of the [Savings Clause] of the Leasing Act.

Id. at 317-318 (emphasis added). Thus, this Court unanimously held that an oil shale claim is "maintained" within the meaning of the Savings Clause in the Leasing Act by the resumption of assessment work "unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened" during the lapse in assessment work. *Id.*

B. In *Hickel*, This Court Preserved Its Holding In *Krushnic*.

To fully understand the meaning of this Court's decision in *Hickel*, a review of the Department's actions after *Krushnic* is necessary. Following *Krushnic*, the Department conceded that it was in no better position than a rival locator with respect to oil shale claims:

> The court [in *Krushnic*] clearly indicated . . . that the Government was in the same position as an adverse claimant. . . . If no third party could

> challenge such a claim after a period of publication, the Government may not do so because it stands in no better position under the law and the decision [in *Krushnic*] than do third parties. . . .

Instructions, Government Proceedings Against Oil Shale Claims for Default in Assessment Work, 53 I.D. 131, 132 (1930) ("*Instructions*"). The Department did recognize, however, that *Krushnic* left open the possibility of filing a contest during a lapse in assessment work and before the publication period expired:

> [T]he United States, in order to make a lawful challenge to the validity of an oil shale claim for failure to do the assessment work in any patent proceedings, must do so at a time when there is an actual default and no resumption of work, and prior to the time the patent proceedings including the publication of notice have completed.

Id.[2] As a result, the Department filed contests against thousands of oil shale claims during lapses in assessment work and declared the claims null and void. *See generally*, *Francis D. Weaver* (*On Rehearing*), 53 I.D. 179 (1930), *The Federal Oil Shale Company*, 53 I.D. 213 (1930), *Virginia-Colorado Development Corp.*, 53 I.D. 666 (1932).

The Department's position, however, was rejected in *Ickes v. Virginia-Colorado Development Corp.*, 295 U.S. 639 (1935). In that case, it was conceded that the contest had been filed during a lapse in assessment work. *Id.* at

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[2] In the instant case, the period of publication expired in 1992, *i.e.*, well before the Department initiated its contest in 1996. App. 56-57.

643. After reaffirming its holding in *Krushnic,* this Court focused on a statement in *Krushnic* that prior to the Leasing Act the government was not concerned with the performance of assessment work because that was an issue solely between rival locators. *Id.* at 645. Based upon this statement, this Court said that the Department's decision voiding the oil shale claims for nonperformance of assessment work "went beyond the authority conferred by law." *Id.* at 646-647.

After its defeat in *Virginia-Colorado*, the Department took the official position that it lacked jurisdiction to challenge oil shale claims for nonperformance of assessment work. *The Shale Oil Company*, 55 I.D. 287, 290 (1935). Thus, the Department expressly overruled and vacated all its earlier decisions that had declared oil shale claims null and void for nonperformance of assessment work. *Id.* As a result of this Court's decisions and the Department's actions, Cliffs' predecessors, and most other oil shale claimants, ceased performing assessment work. *See*, App. 45-46. Notwithstanding this failure to perform assessment work, the Department consistently issued patents for oil shale claims. 56 *Fed. Reg.* 938, 939 (Jan. 9, 1991) ("[f]rom 1935 to the early 1960's, the Department issued patents to approximately 350,000 acres of land for oil shale claims, without regard to whether annual assessment work was done"); *TOSCO Corp. v. Hodel*, 611 F. Supp. 1130, 1157-1163 (D. Colo. 1985), *vacated by agreement of the parties*, 826 F.2d 948 (10th Cir. 1987).

In 1964, the Department reversed its position. Specifically, in *Union Oil Company of California*, 71 I.D. 169 (1964), and *Union Oil Company of California (Supplemental Decision)*, 72 I.D. 313 (1965), the Department ruled that, although its earlier contest decisions that had

declared oil shale claims invalid for nonperformance of assessment work were erroneous, those decisions were nevertheless final because the claimants had not appealed them. The oil shale claimants promptly sought judicial review. In *Oil Shale Corp. v. Udall*, 261 F. Supp. 954, 965-966 (D. Colo. 1966), the District Court held unlawful and set aside the Department's new position because, under *Virginia-Colorado,* the Department lacked jurisdiction to invalidate oil shale claims for nonperformance of assessment work and, therefore, the earlier contest decisions were null and void. The Tenth Circuit affirmed this decision. *Udall v. Oil Shale Corp.*, 406 F.2d 759 (10th Cir. 1969).

The Department then petitioned and was granted *certiorari* on the narrow issue of:

> Whether a 1935 holding of this Court that the Secretary of the Interior had exceeded his authority in cancelling certain mining claims must be given retroactive effect as to other mining claims previously cancelled on the same ground and which were not reasserted until the 1950's.

Petition for *Writ* of *Certiorari* at 2, *Hickel v. Oil Shale Corp.*, 400 U.S. 48 (1970) (Aplts. Supp. App. at 427). Later, the Department expanded upon its request and asked that the decision in *Virginia-Colorado* be overruled or limited to its facts. Brief for the Petitioner, at 2, 65, *Hickel v. Oil Shale Corp.*, 400 U.S. 48 (1970) (Aplts. Supp. App. at 450, 513). Significantly, the Department did not ask this Court to overrule *Krushnic*; instead, the Department advised this Court that the holding in *Krushnic* would not affect the Department's ability to administer the public lands:

> We view [*Krushnic*] as holding only that the [Leasing Act] had not by itself worked the necessary withdrawal of land from location, and that at least some affirmative governmental action to withdraw the lands during a period of assessment work lapse was called for. Whether or not such a holding is also questionable, *it imposes no substantial burden on the development or administration of public lands.*

Id. at 48, n.21 (Aplts. Supp. App. at 496) (emphasis added).

In a four-to-two decision, this Court reversed. In so doing, this Court noted that after passage of the Leasing Act, relocation of an oil shale claim by a rival locator was impossible. *Hickel*, 400 U.S. at 56. This Court then reasoned that the Department must have some authority to challenge an oil shale claim for nonperformance of assessment work; otherwise the assessment work requirement in the Mining Law would be "illusory." *Id.* As a result, this Court deemed the Department a "rival locator" and granted the Department the ability to bring a challenge for nonperformance of assessment work: "[the Savings Clause of the Leasing Act] makes the United States the beneficiary of all claims *invalid* for lack of assessment work or otherwise." *Id.* at 57 (emphasis added). Under the Mining Law, the failure to perform assessment work did not *ipso facto* render a mining claim "invalid," it only rendered it subject to relocation by a rival locator. 30 U.S.C. § 28. Therefore, by granting the Department the status of a "rival locator," this Court allowed the Department to challenge the failure to perform assessment work during a lapse in the work.

Importantly, this Court did not overrule its holding in *Krushnic* that an oil shale claim is "maintained" within the meaning of the Saving Clause in the Leasing Act by the resumption of the assessment work prior to the initiation of a contest.[3] If this Court had overruled *Krushnic*, that ruling would have effectively extinguished all remaining oil shale claims. Instead, this Court remanded the case and instructed that "all issues concerning the *time*, amount, and nature of assessment work will be open so that the claimants will have the opportunity to bring their claims within the narrow ambit of *Krushnic* and *Virginia-Colorado,* as we have construed and limited these opinions." *Id.* at 58 (emphasis added). Thus, this Court realized that the "timing" of the Department's contest vis-à-vis the resumption of assessment work would be a critical issue on remand.[4]

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[3] In dissent, Chief Justice Burger and Justice Stewart stated that they would have affirmed the Tenth Circuit's decision, unless both *Krushnic* and *Virginia-Colorado* were overruled. *Hickel*, 400 U.S. at 61.

[4] This Court was prophetic. On remand, the district court ruled, *inter alia*, that the oil shale claims had been "maintained" within the meaning of the Savings Clause in the Leasing Act by the resumption of assessment work prior to the initiation of the Department's contests. *TOSCO Corp.*, 611 F. Supp. at 1138-1145, 1213-1220. The district court's decision led to a settlement in 1986, which resulted in the patenting of 525 oil shale claims. S. Rep. No. 260, 101st Cong., 2nd Sess. (1990), 1990 WL 258934 (Leg. Hist.)

C. The Tenth Circuit Erroneously Read *Hickel* As Describing The Holding In *Krushnic* As Dictum.

The Tenth Circuit correctly quoted the holding in *Krushnic*. App. 20. The Tenth Circuit, then erroneously read *Hickel* as describing this holding as dictum. *Id.* *Hickel*, however, expressly recognized the holding in *Krushnic*:

> The Court [in *Krushnic*] further *held* that the claims were 'maintained' within the Saving Clause of the Leasing Act by a resumption of the assessment work before a challenge of the claim by the United States had intervened.

Hickel, 400 U.S. at 52 (emphasis added).

Hickel also clearly identified the dicta in *Virginia-Colorado* and *Krushnic*:

> There are, however, dicta both in *Virginia-Colorado* and *Krushnic* that the failure to do assessment work gives the Government no ground for forfeiture but inures only to the benefit of relocators.

Hickel, 400 U.S. at 52. It was this dicta that *Hickel* rejected when it ruled that the Department has jurisdiction to challenge oil shale claims for nonperformance of assessment work:

> We disagree with the dicta in [*Virginia-Colorado* and *Krushnic*] that default in doing the assessment work inures only to the benefit of relocators, as we are of the view that [the Savings Clause] makes the United States the beneficiary of all claims invalid for lack of assessment work or otherwise. It follows that the Department of

> the Interior had, and has, subject matter jurisdiction over contests involving the performance of assessment work.

Id. at 57.

Thus, contrary to the Tenth Circuit's decision, *Hickel* never described the holding in *Krushnic* as dictum. In fact, as demonstrated above, *Hickel* preserved the holding in *Krushnic*. Accordingly, the Tenth Circuit should have affirmed the District Court's decision that the oil shale claims were "maintained" within the meaning of the Savings Clause in the Leasing Act by the resumption of assessment work prior to the Department's contest. Instead, the Tenth Circuit invalidated Cliffs' oil shale claims. In the process, the Tenth Circuit effectively overruled this Court's holding in *Krushnic* and may have also effectively extinguished all remaining unpatented oil shale claims. Therefore, this Petition should be granted to ensure respect of this Court's holding, *Agostini v. Felton*, 521 U.S. 203, 237 (1997), and because the Tenth Circuit's decision affects title to more than 30,000 acres.[5] *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979) (recognizing "special need for certainty and predictability" of title to land).

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[5] The remaining unpatented oil shale claims include 156 owned by the Larson family, which cover approximately 25,000 acres in Utah, see, First Amended Complaint, *Crippled Horse Investments, LP, v. Norton*, No. 2:96-CV-0813G (D. Utah), and 32 unpatented oil shale claims, which cover more than 5,000 acres in Colorado. *ExxonMobil Corp. v. Norton*, 206 F.Supp.2d 1085 (D. Colo. 2002), *appeal pending*, 10th Circuit No. 02-1344.

II. THE TENTH CIRCUIT VIOLATED THIS COURT'S PRECEDENT WHEN IT ACCORDED DEFERENCE TO THE DEPARTMENT'S NEW INTERPRETATION AND GAVE THAT NEW INTERPRETATION RETROACTIVE EFFECT.

After *Krushnic*, the Department took the official position that a challenge to an oil shale claim for nonperformance of assessment work had to be brought during a lapse in the work and before the "publication period" expired. *Instructions*, 53 I.D. at 132. After *Virginia-Colorado*, the Department went even further and took the official position that it lacked jurisdiction to challenge oil shale claims for nonperformance of assessment work. *The Shale Oil Company*, 55 I.D. at 290. These positions were reflected in the Department's regulations that were in effect at all relevant times prior to *Hickel*. *See generally*, 43 C.F.R. § 3420.3 (1969) (recognizing the statutory "Right to Resume Work"); 43 C.F.R. § 3420.4 (1969) (providing assessment work was "solely a matter between rival or adverse claimants").

After *Hickel*, the Department continued to follow this Court's holding in *Krushnic*.[6] For example, in 1972, the Department amended its regulations to make them consistent with *Hickel*. 37 *Fed. Reg.* 17836 (Sept. 1, 1972). The amended regulations continued to recognize the statutory "Right to Resume Work." 43 C.F.R. § 3851.3(b) (1972). The amended regulations also provided that the failure to "comply substantially" with the assessment work

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[6] In so doing, the Department stood by its representation to this Court in *Hickel* that the holding in *Krushnic* would not affect its ability to administer the public lands.

requirement "will render the claim *subject* to cancellation." 43 C.F.R. § 3851.3(a) (1972) (emphasis added). Subjecting a claim to cancellation, as opposed to automatic forfeiture, is totally consistent with this Court's holding in *Krushnic* that a challenge based upon nonperformance of assessment work had to be filed during a lapse in work.[7]

Sixteen years later, the Department advised Congress and the public that it was still following *Krushnic*: "[the] resumption of assessment work prior to the initiation of a challenge is an *absolute defense* in a contest brought on that basis." (Emphasis added). This statement was incorporated by reference into the Department's 1988 Guidelines for Processing Oil Shale Patent Applications.[8] Based upon these Guidelines, Cliffs applied for patents to its oil shale claims in 1989. Transcript of Hearing, *United States v. Cliffs Synfuel Corp.*, UTU-75522, at 234-237 (testimony of Gary D. Aho, President, Cliffs Synfuel Corp.).

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[7] From 1935 until 1972, when the Department amended its regulations, the Department's regulations provided that assessment work was not required on oil shale claims. 43 C.F.R. § 3420.4 (1969) (providing assessment work was "solely a matter between rival or adverse claimants"); *see also*, *The Shale Oil Company*, 55 I.D. at 290. It is axiomatic that regulations bind an agency with respect to conduct occurring (or not occurring) while the regulations remain in effect. *See*, *United States v. Nixon*, 418 U.S. 683, 696 (1974). Thus, when these 36 years are discounted, it is clear, even under the Tenth Circuit's rationale, that Cliffs complied substantially with the assessment work requirement and, thereby, "maintained" its claims within the meaning of the Savings Clause in the Leasing Act.

[8] The 1988 Guidelines were admitted as evidence at the administrative hearing as "Exhibit R-2," were filed as "Exhibit A" to Plaintiff's Motion for Summary Judgment, and are reproduced at App. 77-81.

In 1990, the Department again advised Congress and the public that the resumption of assessment work prior to the initiation of a contest for nonperformance of assessment work was an "absolute defense:"

> In 1972 the Department provided constructive notice alerting all mining claimants that their claims were subject to cancellation for failure to substantially comply with annual assessment requirements (43 CFR 3851.3[a]). Since 1972, the Department is in a better position to contest claims because of nonperformance of annual assessment work, *subject to the constraint of the resumption principle.*
>
> The mining law (30 U.S.C. 28) provides that relocations can be made only while the claimant is in default of his annual obligation if there is to be a forfeiture of rights. Similarly, *the Department must initiate contest action before a mining claimant resumes his labor or be barred from contesting the claim on this basis.* In other words, as the Supreme Court held in *Wilbur v. Krushnic* (1930), the government may not take advantage of a past lapse in assessment work when such work is resumed prior to initiation of the contest.

S. Rep. No. 260, 101st Cong., 2nd Sess. (1990), 1990 WL 258934 (Leg. Hist.) (statement of James M. Hughes, Deputy Assistant Secretary, Land and Minerals Management, U.S. Department of the Interior) (all emphasis added).

The next year, the Department sought to codify the holding in *Krushnic* when it issued a notice of proposed rulemaking. The proposed rule provided, *inter alia*, the "[r]esumption of qualifying assessment work, prior to the

initiation of a challenge by the United States, is an *absolute defense* in a contest brought on that basis." 56 *Fed. Reg.* 938, 941 (Jan. 9, 1991) (proposed 43 C.F.R. § 3851.3(a) (emphasis added)). The purpose of the proposed rule was to:

> [M]ake it clear that a resumption of assessment work after a lapse of any duration, but prior to initiation of a contest by the United States, would prevent invalidation of the claim for substantial failure to comply with the assessment work requirement.

56 *Fed. Reg.* at 940. The proposed rule, however, was never promulgated because the Department believed it was duplicative of the 1988 Guidelines. Transcript of Hearing, *United States v. Cliffs Synfuel Corp.*, UTU-75522, at 237-239 (testimony of Gary D. Aho, President, Cliffs Synfuel Corp.).

Thus, 60 years after *Krushnic* and 20 years after *Hickel,* the resumption of assessment work prior to a contest was still an "absolute defense" to a challenge brought on the basis of nonperformance of assessment work. This all changed when the IBLA ruled in *Herr* that *Hickel* had abrogated the statutory "Right to Resume Work" with respect to oil shale claims. 130 IBLA at 367. The *Herr* decision was the sole basis upon which the IBLA invalidated Cliffs' oil shale claims. App. 52-53. The District Court, however, held that the IBLA's decision invalidating Cliffs' oil shale claims was "an unreasonable interpretation of the statutes, regulations and Supreme Court jurisprudence of the United States of America." App. 26.

The Tenth Circuit also rejected the IBLA's decision. App 18. However, instead of affirming the District Court,

the Tenth Circuit adopted a new interpretation proffered by the Department for the first time on appeal, *i.e.*, the failure to comply substantially with the assessment work requirement results in an automatic forfeiture of an oil shale claim, even if assessment work is resumed prior to a government contest. App. 21-22. In so doing, the Tenth Circuit violated the well-established principle that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Manufactures Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983). To make matters worse, the Tenth Circuit not only accorded *Chevron* deference to the Department's new interpretation (App. 13-14), it gave that interpretation retroactive effect. App. 22 (the claims were forfeited "long before . . . assessment work [was resumed] in 1977"). These actions were in direct conflict with this Court's precedent.

First, the Department's new interpretation was entitled to no deference. It is well established that no deference is to be accorded to an agency's interpretation of an unambiguous statute because a "court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). In *Krushnic,* this Court ruled that the statutory "Right to Resume Work" was "clear" and that the Savings Clause in the Leasing Act was "plain and explicit." 280 U.S. at 316-318. Based upon "the unambiguously expressed intent of Congress," this Court held that the Department could only challenge an oil shale claim for nonperformance of assessment during a lapse in the work. *Id.* at 317-318. Thus, no deference should have been accorded to the Department's new interpretation of these unambiguous

statutes.[9] *Chevron*, 467 U.S. at 843, n.9 ("[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent").

This conclusion is supported by the fact that the Department's new interpretation was not the basis of the "agency action," but was raised for the first time on appeal. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-213 (1988) (no deference to be accorded to an agency's litigation position). This is especially true because the Department's "litigation position" reversed its long-standing interpretation upon which Cliffs had reasonably relied. *See*, *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446, n.30 (1987) (an agency interpretation that conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view). In

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[9] To the extent the Tenth Circuit accorded *Chevron* deference to the Department's interpretation of *Hickel*, it also erred. *See*, *United States v. Mead Corp.*, 533 U.S. 218, 226-235 (2001). In fact, even a generous reading of *Hickel* cannot justify the Department's interpretation. In *Hickel*, this Court stated that a decades-long lapse in assessment work "might be the equivalent of abandonment. . . . " 400 U.S. at 57. "Abandonment" of a mining claim, however, requires evidence of the claimant's intent to relinquish the claim. *United States v. Locke*, 471 U.S. 84, 98 (1985). Thus, at most, *Hickel* stands for the proposition that the failure to comply substantially with the assessment work requirement may be evidence of a claimant's intent to abandon. Conversely, the resumption of assessment work would be evidence of a claimant's intent to keep the claim. Thus, a "case-by-case determination" must be made as to whether the claimant actually intended to abandon the claim. *Locke*, 471 U.S. at 102. In the instant case, that "determination" was never made. Instead, the Tenth Circuit simply ruled that a decades-long lapse in assessment work results in an automatic forfeiture of an oil shale claim, without any inquiry into the intent of the claimant or whether the lapse was in reliance on the Department's regulations.

fact, the Department's longstanding interpretation was the interpretation that the Tenth Circuit should have followed. *See*, *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (a "contemporaneous construction" by the agency charged with administering the statutes is entitled to "great deference"). By adopting the Department's new interpretation, the Tenth Circuit violated this Court's well-established principles regarding the deference to be accorded to agency interpretations.

Second, and just as important, the Tenth Circuit erred in applying the Department's new interpretation retroactively. One of the fundamental protections afforded by the Due Process Clause of the Fifth Amendment is the right to fair warning regarding changes in the law that may affect property rights. *See*, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). Indeed, as explained by this Court:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.

Landgraf v. USI Film Products, 511 U.S. 244, 265-266 (1994). Because of these due process concerns, an agency may not apply a new interpretation retroactively to the detriment of those who relied on the agency's previous interpretation. *United States v. Alabama Great Southern Railroad Co.*, 142 U.S. 615, 621 (1892); *see also*, *Bowen*, 488 U.S. at 208 (an agency may not promulgate a rule with retroactive effect unless authorized by Congress in "express terms").

In the instant case, Cliffs and its predecessors invested substantial sums of money in the oil shale claims.

Aplts. App. at 46-47 (claims acquired in 1969 for $175,000). Cliffs and its predecessors also resumed assessment work in 1977 and performed that work each year until 1992, when Cliffs paid its statutory fees and was absolved of performing additional work. App. 28-29. This money and energy was expended in reliance upon the Department's longstanding interpretation. App. 45-46; *see also*, Transcript of Hearing, *United States v. Cliffs Synfuel Corp*, UTU-75522, at 207-211, 234-237 (testimony of Gary D. Aho, President, Cliffs Synfuel Corp.). Because of this reliance, the District Court noted the "manifest injustice" that would result if the Department's new interpretation was applied retroactively:

> It would by wholly unfair, and inconsistent with any notion of the protection of property rights, if the Department of the Interior were permitted to, in effect, sit back while this assessment work was performed, wait until a patent is sought, and only then assert "sorry, the claim was invalid all along!"

App 36-37.

Unfortunately, this is exactly what happened. Under the Tenth Circuit's decision, the Department was allowed to: "sit back" while Cliffs and its predecessors resumed assessment work and performed that work for 15 years; "wait" while Cliffs went through the "publication period;" accept Cliffs' statutory fees; and only then assert "sorry" the claims were forfeited "long before . . . assessment work [was resumed] in 1977." What makes the Tenth Circuit's decision particularly egregious is that Cliffs' oil shale claims were "silently" forfeited sometime between 1930 and 1977, during a time when the Department's positions were that assessment work was not required (1935-1972)

and that any challenge based upon nonperformance of assessment work had to be brought during a lapse in the work (1930-1994). This Petition should be granted to correct this "manifest injustice."

CONCLUSION

For the foregoing reasons, Cliffs respectfully requests that its Petition for *Writ* of *Certiorari* be granted.

Respectfully Submitted By:

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Dated: October 29, 2002

United States Court of Appeals,
Tenth Circuit.

CLIFFS SYNFUEL CORPORATION, a Utah corporation, Plaintiff-Appellee,

v.

Gale NORTON, Secretary of the United States Department of the Interior, Nina Hatfield, Acting Director, Bureau of Land Management, United States Department of the Interior, Sally Wisely, Director, Utah State Office, Bureau of Land Management, United States Department of the Interior, The Department of the Interior of the United States, Defendants-Appellants.
Crippled Horse Investments, LP; Estate of Frederick H. Larson; Phillips 66 Company; Exxonmobil Corporation, Amici Curiae.

No. 01-4063.

May 31, 2002.

Lisa E. Jones, Attorney, (Gary B. Randall, Attorney, and Katherine W. Hazard, Attorney, Environment & Natural Resources Div., Department of Justice, Washington DC; John Cruden, Acting Assistant Attorney General, Washington, DC; Paul M. Warner, United States Attorney and Jeffrey E. Nelson, Assistant United States Attorney, Salt Lake City, UT; Karen Hawbecker and David K. Grayson, Office of the Solicitor, U.S. Department of the Interior, Washington, DC, with her on the briefs) for Defendants-Appellants.

Robert G. Pruitt, Jr., (Michael S. Johnson and Shawn T. Welch, with him on the brief) Pruitt, Gushee & Bachtell,

1850 Beneficial Life Tower, Salt Lake City, UT, for Plaintiff-Appellee.

James A. Clark of Baker & Hostetler LLP, Denver, CO, for amicus ExxonMobil Corporation; and Donald L. Morgan of Cleary, Gottlieb, Steen & Hamilton, Washington, DC, for amici Crippled Horse Investments, LP, Estate of Frederick H. Larson, and Phillips 66 Company, filed an amici curiae brief.

Before TACHA, Chief Judge, and ALDISERT* and SEYMOUR, Circuit Judges.

ALDISERT, Circuit Judge.

This appeal by Gale Norton, Secretary of the Interior, from a summary judgment in favor of Cliffs Synfuel Corp. ("Appellee"), requires us to decide whether the district court properly construed provisions of the General Mining Law of 1872, 30 U.S.C. §§ 21, *et seq.* ("Mining Law"), and the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181 *et seq.* ("Leasing Act"), in light of the Court's interpretation of these statutes in *Hickel v. Oil Shale Corp.*, 400 U.S. 48, 91 S.Ct. 196, 27 L.Ed.2d 193 (1970). Specifically, we must determine whether Cliffs Synfuel Corp. performed the requisite annual assessment work on its location in order for it to qualify under the savings clause of the Leasing Act. "Assessment work" is defined as "the annual work upon an unpatented mining claim on the public domain necessary under the U.S. law for the maintenance of the possessory title thereto." WEBSTER'S THIRD NEW INT'L

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* Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED (1968).

I.

A.

The Green River Formation, located in eastern Utah, is the site of potentially valuable oil shale deposits. "Oil shale is a sedimentary rock containing an organic material called kerogen which, upon destructive distillation, produces a substantial amount of oil." *Andrus v. Shell Oil Co.*, 446 U.S. 657, 659 n. 3, 100 S.Ct. 1932, 64 L.Ed.2d 593 (1980). Once mined, oil shale can be a valuable fossil fuel. This case involves an attempt by Cliffs Synfuel Corp. to patent four oil shale mining claims in Uintah County, Utah, which encompass approximately 520 acres of the Green River Formation.

Congress enacted the General Mining Law of 1872, which essentially gave away valuable mineral deposits, including oil shale deposits, to whomever first located them. The law was premised on a policy of encouraging exploration of valuable mineral deposits in the western United States. Utilizing the terminology of mining custom, the Mining Act provides that one who claims a mineral deposit is known as a "locator" and is required to perform a certain amount of work each year in prosecution of the claim site, known as the "location." The Act describes this "assessment work:"

> All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent

> monument as will identify the claim. On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less that $100 worth of labor shall be performed or improvements made during each year. . . .
>
> 30 U.S.C. § 28.

If a claimant failed to perform such work for a period and then later "resumed" work before anyone else asserted a claim on the same land, his claim remained intact. This became known in later years as the "resumption doctrine:"

> [U]pon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.
>
> *Id.*

Congress enacted the Mineral Leasing Act in 1920, which "completely changed the national policy over the disposition of oil shale lands." *Hickel,* 400 U.S. at 51, 91 S.Ct. 196. Thereafter, one could no longer simply explore the land, stake a claim and allege title in every situation. Rather, lands containing certain valuable mineral deposits, including oil shale, came within the dominion of the

United States and could be offered to the public only through lease from the government.[1]

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[1] A description of oil shale mining claim activity before and subsequent to the passage of the Mineral Leasing Act of 1920 is set forth in the Secretary of the Interior's Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit in the *Hickel* case:

> At the time, [prior to 1920] there was a great deal of public excitement about oil shale; the nation's known crude oil resources were severely limited, and it therefore seemed that oil shale would soon be required to satisfy the demand for petroleum products. Interest in oil shale flagged, however, when substantial deposits of crude oil were found; thousands of oil shale claims were abandoned and forgotten by the original locators. Before passage of the Mineral Leasing Act of 1920, failure to do assessment work meant that another prospector could locate the claim himself. When that Act withdrew the land from further location, however, the threat of "top-filing," [sic] tending to enforce the assessment work requirement, was no longer present. Given this fact, the sudden disappearance of interest in oil shale claims, and the congressional mandate to reserve oil shale land for leasing, the Secretary determined to treat the failure to do assessment work as forfeiting the claim, so that the land could be put to other uses in the public interest.
>
> Proceedings against such claims began in the late 1920's, and took on substantial proportions. Investigation showed more than 30,000 oil shale claims, embracing more than 4,000,000 acres of public domain in Colorado, Utah and Wyoming, which were not being maintained by the performance of annual assessment work. In the fiscal year ending June 30, 1932, the Secretary declared 10,918 locations, embracing 1,294,500 acres, null and void; and in fiscal 1933, 11,146 locations embracing 1,448,980 acres were cancelled. It is apparent from the volume of claims disposed of that the great majority of the mining claimants must have defaulted, taking no action to protect their interest in what then appeared to be worthless property. Indeed, of the claims involved in this case, only the then holders of the claims now

(Continued on following page)

made by respondent Brown appealed the cancellation within the administrative process; when that administrative appeal was lost, no effort was made to seek judicial review.

The infrequency with which judicial review was sought is striking when it is considered that, when sought, it succeeded. In January, 1930, this Court held in *Wilbur v. Krushnic,* 280 U.S. 306, 50 S.Ct. 103, 74 L.Ed. 445, that the Secretary could not cancel a claim where assessment work had lapsed for a year, but had been resumed before any administrative action had been undertaken against the claim. That decision left open the question whether cancellation would be proper where the Secretary took affirmative action against a claim after a lapse in assessment work and before resumption. The Secretary promptly began to take such action, posting property with challenges to the claims when it was determined that assessment work had not been done during an immediately preceding year. The massive and basically unopposed clearance of claims described above then took place.

Among the few who contested these proceedings were the claimants in *Virginia-Colorado, supra,* who appear to have omitted their assessment work for only fifteen months preceding the Secretary's action, and who alleged in their papers that they stood ready to resume it but for the Secretary's cancellation of their claim. In 1935, as already indicated, they brought their challenge to this Court, which ruled that even in a contest brought prior to resumption of assessment work, failure to do that work for a year was not a valid reason to cancel the claim and that, in doing so, the Secretary "went beyond the authority conferred by law." 295 U.S. at 647, 55 S.Ct. 888. The Secretary promptly "overruled" the contrary administrative decisions, *The Shale Oil Company,* 55 I.D. 287, vacated pending cancellation proceedings, and for a time stood ready to reopen cancellations which had already been made final. It appears that only about 74,000 acres of the several million involved were reclaimed in this fashion.

(Continued on following page)

However, § 37 of the Act contained a "savings clause" which left intact those claims for oil shale which were already in existence as of February 25, 1920, so long as such claims were "thereafter maintained in compliance with the laws under which initiated. . . . " 30 U.S.C. § 193.

The Leasing Act provides in pertinent part:

> The deposits of coal, phosphate, sodium, potassium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, . . . shall be subject to disposition only in the form and manner provided in this chapter, [by lease only] . . . except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.
>
> *Id.*

Thus, if one had a claim that existed prior to February 25, 1920, the claimant would not be required to lease the claimed land from the government, but could perfect title to it so long as the claim was maintained pursuant to pre 1920 law. "Discovery of a 'valuable mineral' is not the only prerequisite of patentability. The mining law also provides

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With the recent revival of interest in oil shale, speculators and others have been buying up the old, cancelled claims. . . .

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit at 3-6, *Hickel v. Oil Shale Corp.*, 400 U.S. 48, 91 S.Ct. 196, 27 L.Ed.2d 193 (1970), reprinted in Appellant's Supp.App. at 427-431 (original record citations omitted).

that until a patent is issued a claimant must perform $100 worth of labor or make $100 of improvements on his claim during each year. . . . " *Andrus,* 446 U.S. at 658 n. 1, 100 S.Ct. 1932 (citing 30 U.S.C. §§ 28, 29).

The dispute before us centers on this savings clause in which former locators of a claim were grandfathered in, provided they qualified. The Secretary contends that Appellee's purported claim does not come within the purview of this exception to the Leasing Act. The district court disagreed and entered judgment in favor of Appellee. The issue is now joined before us.

B.

In 1989, Cliffs Synfuel Corp. filed a mineral patent application with the Utah State Office of the Bureau of Land Management ("USO/BLM") covering four oil shale mining claims, which were originally located in 1917. On October 9, 1992, USO/BLM issued a First Half/Mineral Entry Final Certificate ("Final Certificate") and on February 26, 1993, transmitted the application to a BLM certified mineral examiner in Vernal, Utah, for a field inspection and Mineral Report. The Mineral Report was issued on June 18, 1996. A government contest was initiated by USO/BLM against all four claims alleging (1) lack of discovery on or before February 25, 1920, (2) lack of discovery at the present time, and (3) failure of the claim owners to comply with the annual assessment work required in 30 U.S.C. § 28. On the basis of these charges, USO/BLM requested that all four claims be declared invalid and cancelled.

A two-day evidentiary hearing in Salt Lake City was held on December 15 and 16, 1997, before an Administrative Law Judge ("A.L.J.") of the Interior Department's Office of Hearings and Appeals. Appellee presented testimony and evidence supporting its position that the required "discovery" had been timely on each claim, and that annual assessment work, which had been non-existent for 46 years, had resumed in 1977 in satisfaction of the resumption doctrine codified at 30 U.S.C. § 28.

The A.L.J. determined that all four of Appellee's claims met the standards for "discovery" under the law as it existed both in 1920, as well as the present. He thus rejected the government's two discovery challenges. However, the A.L.J. determined that the four claims were still invalid for failure to comply with the annual assessment work requirement of 30 U.S.C. § 28. In so ruling, he relied on the Interior Department's Interior Board of Land Appeals ("IBLA" or "Board") decision in *United States v. Herr,* 130 IBLA 349, 101 I.D. 113 (1994) to conclude that in light of *Hickel,* the Appellee did not meet the statutory requirements.

Cliffs Synfuel Corp. appealed the A.L.J.'s decision to the Board, asserting that the resumption doctrine was still in effect in 1977 – the year the claim owner resumed assessment work, after 46 years of inactivity. An Administrative Judge of the Board affirmed the A.L.J.'s ruling.

Appellee thereafter filed a complaint in the district court for a review of the Board's final order, as authorized

by the Administrative Procedure Act, 5 U.S.C. §§ 701-706.[2] Appellee requested that the court reverse the agency action on the ground that its decision was arbitrary, capricious and otherwise inconsistent with current law. The district court granted the relief, concluding that the Board had misinterpreted the *Hickel* decision:

> In sum, *Hickel* does not hold that failure to do assessment work, even substantial noncompliance with the assessment requirement, is somehow self-effectuating, or results in the *ipso facto* loss of rights under a pre 1920 mining claim. Rather, the *Hickel* decision stands for the proposition that the Department of the Interior has standing to challenge the holder of oil shale mining claims for failure to substantially comply with the assessment requirements. The IBLA Decision, following *Herr,* seemingly discarded § 28 and § 193's straightforward language to reach an alternative, strained, and erroneous

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[2] Appellee was entitled to seek an injunction and other relief in the district court.

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.

5 U.S.C. § 703.

Where jurisdiction for the review of agency action is exclusively in the courts of appeals, "[r]eview of an agency order is commenced by filing . . . a petition for review with the clerk of a court of appeals authorized to review the agency order." Rule 15(a)(1), Federal Rules of Appellate Procedure. *See also Dillard v. U.S. Dep't of Hous. and Urban Dev.*, 548 F.2d 1142, 1143 (4th Cir.1977) (Per curiam).

> reading of *Hickel.* This was arbitrary, capricious, and an abuse of discretion.

Cliffs Synfuel Corp. v. Babbitt, 147 F.Supp.2d 1118, 1125 (D.Utah 2001).

In reaching its conclusion the court held that although Appellee failed to perform the necessary annual statutory assessment work for 46 years, as mandated by 30 U.S.C. § 28, its resumption of assessment work in 1977, before the initiation of a government contest action, cured the 46 year lapse. The court concluded that the four claims were valid and in good standing and granted Appellee's Motion for Summary Judgment, vacated the Board's decision, and directed the Department of the Interior to diligently process patents for the claims. This appeal followed.

C.

In her appeal, the Secretary contends that the district court failed to respect the fundamental interpretation of § 28 and § 193 as set forth in *Hickel* in the following discrete particulars: (1) the necessity for the claimant to perform annual assessment work each year; (2) that "token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U.S.C. 28, is not adequate to 'maintain' the claims within the meaning of § 37 of the Leasing Act." *Hickel,* 400 U.S. at 57, 91 S.Ct. 196; and, most important for our purposes, (3) that by the terms of the Mineral Leasing Act of 1920, the United States becomes the beneficiary of all pre 1920 oil shale mining claims that are invalidated because of a failure to perform the annual assessment work for a *substantial* period of time. The Secretary argues that the effect of this, insofar as oil shale mining claims are concerned, is that

where there has been a history of decades of failure to respect the annual assessment requirements, the savings clause exception of Mineral Leasing Act of 1920 does not apply.

II.

This appeal concerns a federal question arising under the provisions of the General Mining Law of 1872, 30 U.S.C. §§ 21, *et seq.*, the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181, *et seq.*, and the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Consequently, the United States District Court for the District of Utah had jurisdiction of the underlying action pursuant to 28 U.S.C. § 1331. This court has appellate jurisdiction pursuant to 28 U.S.C. § 1291(a)(1), which provides for jurisdiction of appeals from district court interlocutory orders granting injunctions.

III.

"[I]n reviewing a district court's review of an agency decision, the identical standard of review is employed at both levels; and once appealed, the district court's decision is accorded no particular deference." *Valley Camp of Utah, Inc. v. Babbitt,* 24 F.3d 1263, 1267 (10th Cir.1994) (internal quotation marks and citations omitted). The district court's granting of summary judgment is reviewed *de novo. Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.,* 912 F.2d 1238, 1241 (10th Cir.1990).

Under the Administrative Procedure Act, in reviewing the underlying agency decision denying Appellee's application for a patent, the standard is whether the agency's

decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "The duty of a court reviewing agency action under the 'arbitrary or capricious' standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir.1994) (footnote omitted). In reviewing the agency's explanation, the reviewing court must determine "whether the agency considered all relevant factors and whether there has been a clear error of judgment." *IMC Kalium Carlsbad, Inc. v. Interior Bd. of Land Appeals,* 206 F.3d 1003, 1012 (10th Cir.2000) (quoting *Olenhouse,* 42 F.3d at 1574). However, "the ultimate standard of review is a narrow one." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

Additionally, when reviewing an agency's interpretation of a statute that it administers, a court must apply the two-step analysis set forth by the Court in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). This court has interpreted *Chevron* as follows:

> When reviewing an agency's interpretation of a statute it administers, we first determine whether the statute is unambiguous. If the intent of Congress is clear then we must give effect to that intent. The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If, however, the statute is ambiguous or silent on the issue in question, we must determine whether the agency's determination is based on a permissible

> construction of the statute. If so, we will defer to the agency's interpretation.
>
> In determining the meaning of a statute, we look at not only the statute itself but also at the larger statutory context. We may ascertain the intent of Congress through statutory language and legislative history.

Osborne v. Babbitt, 61 F.3d 810, 812 (10th Cir.1995) (quoting *Utah v. Babbitt,* 53 F.3d 1145, 1148 (10th Cir.1995) (internal quotation marks and citations omitted)).

We now turn to the *Hickel* Court's interpretation of the Mining Act of 1872 and the Mineral Leasing Act of 1920.

IV.

The enactment of the Mineral Leasing Act of 1920 marked a "complete[ ] change [ ][in] the national policy over the disposition of oil shale lands." *Hickel,* 400 U.S. at 51, 91 S.Ct. 196. The Act removed oil shale (and other specified minerals) from subsequent location and private appropriation under the General Mining Law of 1872. "Thereafter such lands were no longer open to location and acquisition of title but only to lease." *Id.*

The Act provides:

> Any person having a valid claim to [oil shale] under existing laws on January 1, 1919, shall, upon the relinquishment of such claim, be entitled to a lease under the provisions of this section for such area of the land relinquished as shall not exceed the maximum area authorized by this

> section to be leased to an individual or corporation.

30 U.S.C. § 241. The relinquishment may be resurrected, however, under the "savings clause" of the Act if the claim was valid prior to February 25, 1920, "and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." 30 U.S.C. § 193.

In *Hickel,* the Court addressed the interrelationship of these two statutes and supplied the answers to two questions, which we must now consider in the resolution of this case: (1) what is the nature of the "assessment work" required to be taken by claimants for their claims to be "thereafter maintained;" and (2) what role is assigned to the United States when the claimants fail to satisfy those requirements?

Prior to *Hickel,* the Court had taken the view that, even after the enactment of the Mineral Leasing Act, an owner of a pre 1920 oil shale claim was under no obligation to perform the requisite assessment work on an annual basis so long as they were able to avail themselves of the resumption doctrine before the claim was relocated by a subsequent claimant. *Wilbur v. Krushnic,* 280 U.S. 306, 317, 50 S.Ct. 103, 74 L.Ed. 445 (1930). Moreover, defaults in assessment work did not mandate that the lands subject to oil shale claims be automatically returned to the government. Instead, the Court intimated that failure to perform assessment work made the claims subject to relocation only by third parties but that "[s]o far as the government was concerned, failure to do assessment work for any year was without effect." *Ickes v. Virginia-Colorado Dev. Corp.,* 295 U.S. 639, 645, 55 S.Ct.

888, 79 L.Ed. 1627 (1935) (citing *Krushnic,* 280 U.S. at 317, 50 S.Ct. 103).

The Court radically altered these two concepts in re-examining the Leasing Act's effect on pre-1920 oil shale clams in *Hickel,* a case in which oil shale claimants sued the Department of the Interior seeking a reinstatement in the late 1950's [3] of claims "cancelled in the early 1930's on the ground that the amount of labor or improvements specified in § 28 had not been made 'during each year.'" *Hickel,* 400 U.S. at 50, 91 S.Ct. 196. The Court first rejected its earlier formulations that had declared the government to be a disinterested party, unable to assert

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[3] The precise time frame is delineated in the Secretary of the Interior's Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit in *Hickel:*

> Respondents are the present owners of claims to oil shale mining locations in Colorado. These claims were cancelled by the Secretary of Interior in 1928-1931 when he determined that the then owners of the claims had failed to meet a statutory obligation to do assessment work – $100 annual labor or improvements on each claim – as required by 30 U.S.C. 28. In 1935, this Court held that the requirement of assessment work could not be used as a ground for cancellation by the government, but was significant only for the purpose of determining rights to the claim as between competing prospectors. *Ickes v. Development Corp. (Virginia-Colorado),* 295 U.S. 639, 55 S.Ct. 888, 79 L.Ed. 1627. The present claims were not involved in that case, and no attempt was made then, or until the late 1950's, to revive them. They remained cancelled on the Department's records.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit at 2, *Hickel v. Oil Shale Corp.,* 400 U.S. 48, 91 S.Ct. 196, 27 L.Ed.2d 193 (1970), reprinted in Appellant's Supp.App. at 427 (original record citations omitted).

rights to a pre-1920 oil shale claim upon which assessment work had been discontinued. It stated that "if we assume, *arguendo,* that failure to do assessment work as provided in the 1872 Act concerned at the time only the claimant and any subsequent relocator, the United States, speaking through the Secretary of the Interior, became a vitally interested party by reason of the 1920 Act." *Hickel,* 400 U.S. at 53, 91 S.Ct. 196. Further, the Court said:

> If we were to hold to the contrary that enforcement of the assessment work of § 28 was solely at the private initiative of relocators, the "maintenance" provision of § 37 becomes largely illusory, because relocation of oil shale claims became impossible after the 1920 Act. So if enforcement of the assessment work requirement of § 28 were dependent solely on the activities and energies of oil shale relocators, there was no effective enforcement device.

Id. at 56, 91 S.Ct. 196.

The Court then delineated what actions are required to "thereafter maintain" an oil shale claim:

> We agree with the Court in *Krushnic* and *Virginia-Colorado* that every default in assessment work does not cause the claim to be lost. Defaults, however, might be the equivalent of abandonment; and we now hold that token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U.S.C. § 28, is not adequate to "maintain" the claims within the meaning of § 37 of the Leasing Act. To hold otherwise would help defeat the policy that made the United States, as the prospective recipient of royalties, a beneficiary of these oil shale claims. We cannot support *Krushnic* and

> *Virginia-Colorado* on so broad a ground. Rather, their dicta to the contrary, we conclude that they must be confined to situations where there had been substantial compliance with the assessment work requirements of the 1872 Act, so that the "possessory title" of the claimant, granted by 30 U.S.C. § 26, will not be disturbed on flimsy or insubstantial grounds.
>
> *Id.* at 57, 91 S.Ct. 196.

From the Court's statement "that *every* default in assessment work does not cause the claim to be lost," it logically follows that in each case we must consider the quantum of the actual assessment work performed and the length of time the claimant failed to meet the annual assessment work required by the Mining Act of 1872.[4]

The Court set forth the template in *Hickel.* It noted that in the case before it, the claims had been "cancelled in the early 1930's on the ground that the amount of labor or improvements specified in § 28 had not been made 'during each year.'" *Hickel,* 400 U.S. at 50, 91 S.Ct. 196. Some twenty years would pass before the claimants re-asserted their right to these claims and during this period they performed no assessment work. Annual assessment work had basically ceased prior to the 1930's as well as in the twenty years thereafter. It was this long period of inactivity that influenced the Court to distinguish the facts in *Hickel* from those in *Krushnic* and *Virginia-Colorado.* By

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[4] In so framing our path of inquiry, we perforce reject the more sweeping statement in *United States v. Herr,* that "the resumption doctrine was no longer applicable to oil shale claims." *Herr,* 130 IBLA 349, 367 (1994).

way of contrast, in *Krushnic,* the Court held that the Secretary could not cancel a claim where assessment work had lapsed *for only a year.* The Court reached a similar decision in *Virginia-Colorado,* where the claimants had performed assessment work from 1917 to 1930 and omitted assessment work *for only fifteen months* preceding the Secretary's action. Moreover, when the assessment work ceased in 1931, the claimant had stated its intention and made arrangements to resume assessment work shortly thereafter. *Virginia-Colorado,* 295 U.S. at 643, 55 S.Ct. 888.

V.

In determining where the axe will fall in the case at bar, it is obvious that the facts here are decidedly more similar to the situation which confronted the Court in *Hickel,* rather than in *Krushnic* or *Virginia-Colorado.* It is undisputed that for almost five decades Appellee failed to perform any assessment work on the four claims. The A.L.J. determined that assessment work was properly performed from 1918-1930 and from 1977-1992. However, he also found that no assessment work affidavit was filed with the county office and no assessment work was performed during the 46-year period stretching from July 1, 1931 to September 1, 1977. Under these circumstances our decision is driven by the facts and reasoning set forth in *Hickel.*

Krushnic is an example of an earlier view of the role of the government in oil shale cases. There the Court held that the government was required to actively step in and challenge a delinquent claim before it could take possession.

> While [a claimant] is required to perform labor of the value of $100 annually, a failure to do so does not *ipso facto* forfeit the claim, but only renders it subject to loss by relocation . . . and we think it is no less clear that after failure to do assessment work, the owner equally maintains his claim, within the meaning of the Leasing Act, by a resumption of work, unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened. . . .

Krushnic, 280 U.S. at 317-318, 50 S.Ct. 103.

This statement was the polestar of the district court's approach to this case. The court was of the view that divestment of an oil shale claim "could only occur upon the simultaneity of the claim holder's failure to maintain *and* the subsequent relocation of the claim by a third person." *Cliffs Synfuel Corp.,* 147 F.Supp.2d at 1124 (emphasis in original). It noted that under 30 U.S.C. § 28, "[o]ne can redeem a claim by resuming performance of the necessary labor or improvement to the claim before another person 'relocates' the claim." *Id.* at 1122. Therefore, because Appellee had resumed annual assessment work in 1977, before the government had undertaken any action, the district court opined that the four oil shale claims were valid and in good standing.

But the *Krushnic* statement, (later described by the Court in *Hickel* as dictà) relied upon by the district court, and the anchor of Appellee's defense of the district court's judgment in its favor, tracked too broad a compass:

> We cannot support *Krushnic* and *Virginia-Colorado* on so broad a ground. Rather, their dicta to the contrary, we conclude that they must be confined to situations where there had been

> substantial compliance with the assessment work requirements of the 1872 Act, so that the "possessory title" of the claimant, granted by 30 U.S.C. § 26, will not be disturbed on flimsy or insubstantial grounds.

Hickel, 400 U.S. at 57, 91 S.Ct. 196.

In its more precise approach in *Hickel* that limited the sweep of *Krushnic* and *Virginia-Colorado,* the Court validated the ability of the government, as the "beneficiary of all claims invalid for lack of assessment work," *sua sponte* to challenge pre-1920 oil shale claims. The Court referred to the legislative history of the Mining Law of 1872 and emphasized that "[w]hile the objective of the 1872 Act was to open the lands 'to a beneficial use by some other party,' once the original claimant defaulted, the defeasance inevitably accrued to the United States, owner of the fee." *Id.* at 55, 91 S.Ct. 196. The Court declared that "we are of the view that § 37 of the 1920 Act makes the United States the beneficiary of all claims invalid for lack of assessment work or otherwise." *Id.* at 57, 91 S.Ct. 196. We hold that this is precisely the legal consequence of the long term inactivity on the four claims at issue before us.

A.

On the basis of *Hickel's* teachings, we conclude that the 46 years of inaction on Appellee's claims reflects "token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U.S.C. § 28. . . . " *Id.* at 57, 91 S.Ct. 196. Therefore, in this case, "the 1920 Act makes the United States the beneficiary of all claims invalid for lack of assessment work or otherwise." *Id.* The court erred in granting summary judgment

in favor of Appellee and should properly have entered judgment in favor of the Secretary of the Interior.

In so concluding, we perforce reject Appellee's suggestion that its assessment work, which took place from 1977 through 1992, offsets the previous 46 years of dereliction and restores a legitimate right to the claims by constituting more than "token assessment work." The short answer to this is that by appropriate analogy, this argument was rejected by the Court in *Hickel* when it noted that a decades-long lapse on assessment work "might be the equivalent of abandonment. . . . " *Id.* at 57, 91 S.Ct. 196. Applying the rationale of the Court, we hold that prior to 1977 Appellee's "default in doing the assessment work . . . ma[de] the United States the beneficiary of all claims invalid for lack of assessment work" long before it resumed assessment work in 1977. *Id.* at 57, 91 S.Ct. 196. Appellee's activity that began in 1977 was too little, too late.

B.

This, too, must be said. Amendments to the Mining Law, together with subsequent congressional enactments, further confirm that the district court's decision is in conflict with Congress' intent in the Leasing Act to require claimants to perform annual assessment work in order to preserve the validity of their pre 1920 oil shale claims. To be sure, the Court has cautioned that "arguments predicated upon subsequent congressional actions must be weighed with extreme care." *Andrus,* 446 U.S. at 666 n. 8, 100 S.Ct. 1932. However, it also teaches (in construing another facet of the 1920 Act) that subsequent congressional actions should not be "rejected out of hand as a

source that a court may consider in the search for legislative intent." *Id.*

The Federal Land Policy and Management Act ("FLPMA"), enacted in 1976, requires claim holders to file an annual affidavit detailing the assessment work performed on the claim. The statute makes the failure to file an affidavit of assessment work a *per se* abandonment of the claim:

> The failure to file such instruments as required by subsections (a) and (b) of this section shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner; but it shall not be considered a failure to file if the instrument is defective or not timely filed for record under other Federal laws permitting filing or recording thereof, or if the instrument is filed for record by or on behalf of some but not all of the owners of the mining claim or mill or tunnel site.

43 U.S.C. § 1744(c).

Similarly, the Energy Policy Act of 1992, which revised and clarified the requirements for patenting oil shale claims, confirms the Court's holding in *Hickel*. The Act provides that "[t]he holder of a valid oil shale mining claim who has filed a patent application and received first half final certificate for patent by October 24, 1992, may obtain a patent pursuant to the general mining laws of the United States." 30 U.S.C. § 242(b). The Act further provides that for claims which had not received the final certificate, "the claim holder shall *no longer be required* to perform annual labor, and instead shall pay to the Secretary $550 per claim per year. . . . " 30 U.S.C. § 242(e)(2) (emphasis added). The language "shall no longer be

required" evidences Congress' understanding that prior to the statute's enactment, a claim holder was required to perform annual labor in order to maintain his claim.

* * *

For the foregoing reasons, we hold that Appellee was not entitled to the claims under the savings clause of the Mineral Leasing Act of 1920. Accordingly, the judgment of the district court is reversed.

United States District Court,
D. Utah,
Central Division.

CLIFFS SYNFUEL CORP., a Utah corporation, Plaintiff,

v.

Bruce BABBITT, Secretary of the United States Department of the Interior; Thomas Fry, Acting Director, Bureau of Land Management, United States Department of the Interior; G. William Lamb, Director, Utah State Office, Bureau of Land Management, United States Department of the Interior; and the United States Department of the Interior, Defendants.

No. 2:99CV0133-ST.

Jan. 29, 2001.

George M. Haley, Home Roberts Owen LLP, Salt Lake City, UT, Robert G. Pruitt, Jr., Michael S. Johnson, Pruitt Gushee & Bachtell, Salt Lake City, UT, Donald L. Morgan, Cleary Gottlieb Steen & Hamilton, Washington, DC, for Cliffs Synfuel Corp.

Donald L. Morgan, Cleary Gottlieb Steen & Hamilton, Washington, DC, for Crippled Horse Investments, Estate of Frederick H. Larson, Tosco Corp.

Jeffrey E. Nelson, U.S. Attorney's Office, Salt Lake City, UT, for Bruce Babbitt, Thomas Fry, G. William Lamb, Dept. of Interior.

MEMORANDUM AND ORDER

STEWART, District Judge.

The issue before this court is whether the decision of the Interior Department's Interior Board of Land Appeals, ("IBLA"), captioned *United States v. Cliffs Synfuel Corp.*, IBLA 98-306 (the "IBLA Decision") is in error. The IBLA Decision is founded upon a prior IBLA decision, *U.S. v. John J. Herr, et al.*, IBLA 92-448, 101 I.D. 113 (1994), (the "*Herr* decision"). In *Herr,* the IBLA construed the United States Supreme Court decision in *Hickel v. Oil Shale Corporation,* 400 U.S. 48, 91 S.Ct. 196, 27 L.Ed.2d 193 (1970), (the "*Hickel* decision"), to have abrogated the resumption doctrine – codified at 30 U.S.C. § 28 (1986) – as to oil shale mining claims. Because the IBLA Decision ignores the literal language of 30 U.S.C. § 28, particularly that part which allows resumption of the rights under a mining claim when assessment work is recommenced, and because the IBLA Decision misinterprets the *Hickel* decision, this Court concludes that the IBLA Decision was arbitrary, capricious, an abuse of discretion, contrary to law, and otherwise an unreasonable interpretation of the statutes, regulations and Supreme Court jurisprudence of the United States of America.

I. BACKGROUND

The Green River Formation, located in eastern Utah, is the site of potentially valuable oil shale deposits. Oil shale is defined as "fine-grained sedimentary rock containing solid organic matter that yields significant quantities

of oil when heated." Encyclopedia Brittanica (2000). Once mined, oil shale can be a valuable fossil fuel.[1] This case involves an attempt by Plaintiff, Cliffs Synfuel Corporation, to patent four oil shale mining claims covering approximately 520 acres within the Green River Formation.

In the mid-Nineteenth century, Congress enacted the General Mining Law of 1872 that essentially gave away valuable mineral deposits, including oil shale deposits, to whomever first located them. The law was premised on a policy of encouraging exploration of valuable mineral deposits in the West. *See generally* 30 U.S.C. §§ 22-42 (1986). Following mining custom, the General Mining Law of 1872 provided that one who claimed a mineral deposit was required to perform a certain amount of work each year in prosecution of that claim in order to preclude subsequent miners from claiming the same land. 30 U.S.C. § 28 (1986). However, if a claimant failed to perform such work for a period and then later "resumed" work before anyone else asserted a claim on the same land, then his claim remained intact. *Id.* This became known in later years as the "resumption doctrine."

In 1920, Congress enacted the Mineral Lands Leasing Act, which had the effect of "completely chang[ing] the national policy over the disposition of oil shale lands." *Hickel,* 400 U.S. at 50, 91 S.Ct. at 198. No longer could one simply explore, stake a claim, and claim title. Rather,

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[1] It has been estimated by the United States Geological Survey that the Utah portion alone of the Uintah Basin contains sufficient oil shale to produce over forty-two billion barrels of crude oil. U.S. Geological Survey Bulletin 691 B.

lands containing certain valuable mineral deposits, including oil shale, were available only through lease from the United States. *See* 30 U.S.C. §§ 181, 193, 241 (1986). However, the Act left intact those valid claims for, (among other things), oil shale already in existence as of February 25, 1920, so long as such claims were maintained in compliance with pre 1920 law. *See* 30 U.S.C. § 193 (1986); *Hickel,* 400 U.S. at 51, 91 S.Ct. 196 (calling § 193 a "Saving[s] Clause"). Thus, if one had a valid claim that existed prior to February 25, 1920, the claimant would not be required to lease the claimed land on which the claim rested so long as the claim was maintained pursuant to pre-1920 law.

In 1989, Cliffs Synfuel Corporation ("Cliffs"), filed with the Utah State Office of the Bureau of Land Management ("USO/BLM") a mineral patent application, serial number UTU 65275, covering four oil shale mining claims, which claims were originally located in 1917.[2] On October 9, 1992, the USO/BLM issued a First Half / Mineral Entry

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[2] Appendix C to the Bureau of Land Management's Mineral Report, (prepared in connection with Cliffs' patent application, and filed with the administrative court as Exhibit G4), is a summary of the claims at issue. The summary reveals that the claims were originally filed on September 17, 1917 by E.D. Lorimer and eight other persons. From 1920 to 1925, and 1927 to 1930 affidavits of labor were filed by various persons with the Uintah County Recorder Office, which affidavits presumably confirmed that the requisite labor or improvement was performed on the claims. However, from August 1930 to January 1978 no affidavits were filed. During this interim, the claims had been purchased by Sohio Petroleum Company. On February 28, 1978, Sohio filed the first affidavit of labor since 1930. Affidavits of labor were continually filed on an annual basis until Sohio sold the claims to Cliffs in 1986. Thereafter, Cliffs continued to file affidavits of labor and/or assessment work.

Final Certificate ("Final Certificate") and on February 26, 1993, transmitted the application to a BLM certified mineral examiner in Vernal, Utah, for a field inspection and Mineral Report. The Mineral Report was issued on June 18, 1996. A government contest was initiated by USO/BLM against all four claims alleging (1) lack of discovery on or before February 25, 1920, (2) lack of discovery at the present time, and (3) failure of the claim owners to comply with 30 U.S.C. § 28. On the basis of these charges, USO/BLM requested that all four claims be declared invalid and canceled.

A two-day evidentiary hearing in Salt Lake City was held on December 15 and 16, 1997, before Administrative Law Judge Nicholas T. Kuzmack of the Interior Department's Office of Hearings and Appeals. Cliffs presented testimony and evidence supporting its position that required "discovery" had been timely made on each claim, and that annual assessment work, deficient for many years, had resumed in 1977, under the resumption doctrine codified at 30 U.S.C. § 28.

ALJ Kuzmack ruled in a written decision dated April 7, 1998, that all four Cliffs' claims met the standards for "discovery" both as of February 25, 1920, and as of the present, and thus rejected the government's two "discovery" challenges. However, Judge Kuzmack ruled that the four claims were still invalid for failure to comply with 30 U.S.C. § 28. ALJ Kuzmack reasoned that his finding on this point was controlled by the *Herr* decision, which declared the resumption doctrine "abandoned." The *Herr* decision relied upon the *Hickel* decision to support its conclusion concerning the status of the resumption doctrine.

Cliffs appealed Judge Kuzmack's ruling to the IBLA insofar as it was adverse to the mining claims, asserting that the resumption doctrine was still in effect in 1977 – the year the claim owner resumed deficient assessment work. The USO/BLM also appealed Judge Kuzmack's ruling on the "discovery" issues, but that appeal was dismissed on jurisdictional grounds. On November 23, 1998, IBLA Administrative Judge James P. Terry issued a written opinion affirming ALJ Kuzmack's ruling, (the IBLA Decision).

On March 3, 1999, Cliffs filed a Complaint with this Court seeking judicial review of the IBLA Decision. Defendants filed an Answer on May 10, 1999. Cliffs then filed a Motion and Memorandum for Summary Judgment on September 10, 1999. On November 5, 1999, a Motion for Leave to File an Amicus Brief, with intended Brief Amicus attached, was filed with the Court by separate counsel for three owners of oil shale mining claims under challenge by the Interior Department on the same "assessment work" issue involved in the IBLA Decision in this case. Oral argument was heard on Cliffs' Motion for Summary Judgment on November 7, 2000.

II. STANDARD OF REVIEW

Judicial review of an agency decision is governed in part by 5 U.S.C. § 706, which provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

. . . .

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .

Under the arbitrary and capricious standard, the Court must determine "whether the agency considered all relevant factors and whether there has been a clear error of judgment." *IMC Kalium Carlsbad, Inc. v. Interior Board of Land Appeals,* 206 F.3d 1003, 1012 (10th Cir.2000).

Additionally, when reviewing an agency's interpretation of a statute that it administers, this Court must apply the two-step analysis enunciated by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The Tenth Circuit has clearly explained what analysis is required by *Chevron:*

> When reviewing an agency's interpretation of a statute it administers, we first determine whether the statute is unambiguous. If the intent of Congress is clear then we must give effect to that intent. The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If, however, the statute is ambiguous or silent on the issue in question, we must determine whether the agency's determination is based on a permissible construction of the statute. If so, we will defer to the agency's interpretation.
>
> In determining the meaning of a statute, we look at not only the statute itself but also at the larger statutory context. We may ascertain the

> intent of Congress through statutory language and legislative history.

Osborne v. Babbitt, 61 F.3d 810, 812 (10th Cir.1995) (quoting *Utah v. Babbitt,* 53 F.3d 1145, 1148 (10th Cir.1995)).

III. THE RESUMPTION DOCTRINE

At the heart of the dispute in this case is the status of the resumption doctrine after the *Hickel* decision. The resumption doctrine was codified at 30 U.S.C. § 28 as part of the 1872 Mining Act and reads in relevant part:

> On each claim located after the 10th day of May 1872, that is granted a waiver under section 28f of this title, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year . . . and upon failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, *provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.*

30 U.S.C. § 28 (1986) (emphasis added).

As evident by the clear language of the statute, one must perform at least $100 worth of labor or improvement each year lest one's claim becomes subject to relocation. However, the failure to perform such work does not automatically result in loss of the claim, but only subject to loss. One can redeem a claim by resuming performance

of the necessary labor or improvement to the claim before another person "relocates" the claim.

IV. *DISCUSSION*

The Court begins by noting the clear Congressional intent expressed in § 28. The statute is not ambiguous and clearly sets forth the resumption doctrine. Thus, as an initial matter, this Court is charged with giving effect to the statute. *Osborne,* 61 F.3d at 812. The IBLA and *Herr* decisions held that the resumption doctrine was abandoned as to oil shale claims. For authority, they cite the *Hickel* decision. However, even the most generous reading of *Hickel* reveals that the IBLA's interpretation of the decision is unsupportable.

In *Hickel,* the Supreme Court was asked to determine if certain contests to oil shale mining claims in the early 1930's, which contests resulted in the cancellation by the Secretary of the Interior of the subject claims for failure of the claimants to perform assessment work, were void. The claim owners relied on dicta in two previous Supreme Court decisions – *Wilbur v. United States ex rel. Krushnic,* 280 U.S. 306, 50 S.Ct. 103, 74 L.Ed. 445 (1930) and *Ickes v. Virginia-Colorado Development Corp.,* 295 U.S. 639, 55 S.Ct. 888, 79 L.Ed. 1627 (1935) – to the effect that the failure to do assessment work inures only to the benefit of private persons wishing to "relocate" the claim. Based upon this dicta, the claim owners argued that the United States, specifically the Secretary of the Interior, did not have subject matter jurisdiction over the dispute, and therefore could not cancel the claims. *Hickel,* 400 U.S. at 50-53, 91 S.Ct. 196.

The Supreme Court rejected this argument on the grounds that the 1920 Act put the United States in the same position as a private locator under the Act, and thus allowed the United States to challenge the status of a mining claim for failure of the claimant to perform assessment work. The Supreme Court stated:

> We disagree with the dicta in these opinions that default in doing the assessment work inures only to the benefit of relocators, as we are of the view that § 37 of the 1920 Act makes the United States the beneficiary of all claims invalid for lack of assessment work or otherwise. It follows that the Department of the Interior had, and has, subject matter jurisdiction over contests involving the performance of assessment work.

Id. at 57, 91 S.Ct. 196.

Hickel stands for the proposition that the 1920 Act put the United States in the same position, (and thus gave the United States the same rights), as a private mining claimant to challenge the status of a mining claim that has not had the required assessment work performed. Such mining claims have not been made "invalid" for failure to do assessment work, only subject to challenge. *Hickel* gives the United States the same standing as a private mining claimant might exercise – the right to challenge the rights to the claim. In the case of a private mining claimant, that right consists of a right to relocate the claim. In the case of the United States, it is the right to challenge the validity of the claim in an appropriate forum.

The IBLA in *Herr* made a remarkable extrapolation from *Hickel,* one that dilutes the Supreme Court's guidance and pushes the margin of reasonable interpretation. The *Herr* court "reasoned" that because the United States

had been deemed the "beneficiary of all claims invalid for lack of assessment work," *Hickel,* 400 U.S. at 56, 91 S.Ct. 196, the "resumption doctrine was no longer applicable to oil shale claims." *Herr,* 130 IBLA at 367. Thus, according to *Herr,* the Supreme Court in *Hickel* effected a line-item veto to § 28 – striking the clause "provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location" – as applied to oil shale claims. Although this Court need not expend much time or space to crystallize the patent defect in this reading of *Hickel,* the more obvious reasons for rejecting this interpretation will be set forth.

First, nothing in the *Hickel* opinion suggests that the Supreme Court intended to abrogate the resumption doctrine. In fact the status of the resumption doctrine as it existed after the 1920 Act was not at issue in *Hickel.* There was no assertion in *Hickel* that assessment work had been resumed prior to the challenges in the 1930's by the Secretary of the Interior. The sole issue was whether, pursuant to post 1920 Act mining policy, the failure to perform assessment work gave the United States the opportunity to challenge a claim. If the Supreme Court had intended to invalidate § 28 as it applied to pre-1920 oil shale claims, it would have expressly done so; the Supreme Court knows how to say a statute is invalid. Accordingly, this Court finds that the *Herr* decision misinterprets the *Hickel* decision. Because the misinterpretation is contrary to the plain and unambiguous language of § 28

and the Savings Clause of § 193,[3] the construction advanced in *Herr* must be rejected as contrary to clear congressional intent. For the same reason, the IBLA Decision in this case which followed *Herr* must be rejected as contrary to clear congressional intent as set forth in unambiguous statutory language.

Second, the *Herr* court's misinterpretation of *Hickel* could easily lead to a manifest injustice as evidenced by this very case. For example, a mining claimant could be the owner, or the purchaser, of oil shale mining claims with a history of noncompliance with assessment work requirements, but with hopes that the claim could be revived by resuming assessment work consistent with § 28. Substantial sums of money could be invested in working the claims, or in buying and selling such claims, all in reliance that § 28 means what it states. It would by [sic] wholly unfair, and inconsistent with any notion of the protection of property rights, if the Department of the Interior were permitted to, in effect, sit back while this assessment work was performed, wait until a patent is

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[3] 30 U.S.C. § 193 provides:

> The deposits of coal, phosphate, sodium, potassium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits in Lander, Wyoming, coal entries numbered 18 to 49, inclusive, shall be subject to disposition only in the form and manner provided in this chapter, except as provided in sections 1716 and 1719 of title 43, *and except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws,* including discovery.

(emphasis added).

sought, and only then assert "sorry, the claim was invalid all along!"

Intensifying the injustice resulting from *Herr*'s erroneous interpretation of *Hickel* is the fact that pre-1920 mining claims, provided certain conditions were met, vested the claimants with property rights. *See, e.g., Best v. Humboldt Placer Mining Co.,* 371 U.S. 334, 336, 83 S.Ct. 379, 9 L.Ed.2d 350 (1963); *Gwillim v. Donnellan,* 115 U.S. 45, 5 S.Ct. 1110, 29 L.Ed. 348 (1885). The divestment of these property rights could only occur upon the simultaneity of the claim holder's failure to maintain *and* the subsequent relocation of the claim by a third person. However, the third person, of course, had to affirmatively relocate the claim. The claim did not *ipso facto* revert to the third person upon the original claimant's failure to maintain it. *Hickel* holds that the 1920 Act changed this process by putting the United States in the same position as third persons were prior to the Act. However, the 1920 Act, as construed by *Hickel,* did not give the United States greater rights to challenge title to claims than third persons possessed. Rather, just like private individuals prior to the 1920 Act, and in harmony with giving full effect to § 28 and § 193's unambiguously expressed congressional intent, if the United States desires to recapture a claim as the "beneficiary of claims invalid," it must take some affirmative action towards invalidating the claim before assessment work has resumed.[4]

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[4] To be clear, the Court does not intend to infer that the United States must take affirmative action before the resumption of assessment work in order to have *standing* to challenge a mining claim. The United States clearly has standing to challenge any mining claim to the

(Continued on following page)

Third, only one year prior to the *Herr* decision, § 28 was amended by Congress, which amendment left the resumption doctrine unaltered.[5] Where Congress has amended a statute, but left some portions unchanged, the presumption is that Congress intended to leave the untouched provisions' original meaning intact. *See Kirchner v. Kansas Turnpike Authority,* 336 F.2d 222, 230 (10th Cir.1964) ("Provisions of the original Act which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law."); *Tyson v. United States,* 285 F.2d 19, 22 (10th Cir.1960) ("[P]rovisions of an original act or section re-enacted or substantially repeated in an amendment are construed as a continuation of the original law."); *Chelette v. Harris,* 229 F.3d 684, 686 (8th Cir.2000) ("When Congress repeatedly amends only some portions of a statute, we infer that it intends no change to the law of unamended portions."); *American Casualty Co. of Reading, Pennsylvania v. Nordic Leasing, Inc.,* 42 F.3d 725, 732, n. 7 (2d Cir.1994) ("Where sections of a statute have been amended but certain provisions have been left unchanged, we must generally assume that the legislature intended to leave the untouched provisions' original meaning intact."). Thus, more than twenty years after *Hickel,* and only one

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extent allowed by *Hickel.* This Court is concerned about the United States' wrongful invalidation of mining claims properly preserved pursuant to the resumption doctrine, not the United States' standing or ability to challenge such mining claims.

[5] The 1993 Amendment inserted "that is granted a waiver under section 28f of this title," after "On each claim located after the 10th day of May, eighteen hundred and seventy-two." *See* Pub.L. 103-66, § 10105(b).

year prior to *Herr,* the presumption was that Congress intended the resumption doctrine's original meaning to be left intact. Part of § 28's original meaning was, of course, that the resumption doctrine applied to oil shale claims. The IBLA and *Herr* decisions wholly fail to state any adequate grounds that overcome this presumption.

Finally, this Court finds persuasive Judge Finesilver's decisions interpreting *Hickel,* decisions that were contemporaneous with the *Hickel* decision. Those decisions are much better authority for the proper interpretation of *Hickel* than the IBLA Decision some twenty years later. This Court adopts Judge Finesilver's reasoning in the three cases cited by counsel: *Oil Shale Corp. v. Morton,* 370 F.Supp. 108 (D.Colo.1973); *TOSCO v. Hodel,* 611 F.Supp. 1130 (D.Colo.1985); and *Marathon Oil Co. v. Lujan,* 751 F.Supp. 1454 (D.Colo.1990).

In sum, *Hickel* does not hold that failure to do assessment work, even substantial noncompliance with the assessment requirement, is somehow self-effectuating, or results in the *ipso facto* loss of rights under a pre-1920 mining claim. Rather, the *Hickel* decision stands for the proposition that the Department of the Interior has standing to challenge the holder of oil shale mining claims for failure to substantially comply with the assessment requirements. The IBLA Decision, following *Herr,* seemingly discarded § 28 and § 193's straightforward language to reach an alternative, strained, and erroneous reading of *Hickel.* This was arbitrary, capricious, and an abuse of discretion.

V. CONCLUSION AND ORDER

Plaintiff's Motion for Summary Judgment is GRANTED except as to the relief sought on the basis of estoppel, as to which it is not necessary for the Court to make a specific finding. Because the record is clear that Cliffs performed adequate annual assessment work on its claims beginning in 1978, and otherwise complied with all other assessment work requirements, the Court finds it unnecessary to remand for a determination of whether Cliffs' claims were revived by the resumption doctrine. Accordingly, the Court recognizes the four oil shale mining claims as being valid and in good standing, and the decisions of the Office of Hearings and Appeals and the IBLA are vacated and set aside insofar as they purport to invalidate the subject claims. The United States Department of the Interior is ordered to proceed diligently to process Cliffs' Mineral Patent Application and to issue the requested patent. The Court will retain jurisdiction of this case, and requires Defendants to show good cause within sixty (60) days of this Order if there is any reason why the applied-for patent should not issue promptly.

IT IS SO ORDERED.

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals

UNITED STATES

v.

CLIFFS SYNFUEL CORP.

IBLA 98-306

Decided November 23, 1998

APPEARANCES: Robert G. Pruitt, Jr., Esq., Salt Lake City, Utah, for Appellant; David Grayson, Esq., Office of the Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Cliffs Synfuel Corporation (Cliffs) has appealed from an April 7, 1998, Decision by Administrative Law Judge Nicholas T. Kuzmack declaring the Cliff Nos. 6, 8, 9, and 10 unpatented oil shale placer mining claims, situated in the SW ¼ of sec. 31, T. 10 S., R. 25 E., Salt Lake Meridian, Utah, and the SW ¼ NW ¼ and the W ½ SW ¼ of sec. 5, and the SE ¼ NE ¼ and the NE ¼ SE ¼ of sec. 6 and the NW ¼ of sec. 8, T. 11 S., R. 25 E., Salt Lake Meridian, Utah, null and void for failure to substantially comply with annual assessment work requirements at 30 U.S.C. § 28 (1994). (Decision at 10-11.)

The claims were located on September 14, 1917. (Ex. g-6, at 9.) Cliffs acquired the claims from Standard Oil in 1986. (Tr. 235.) On March 22, 1989, Cliffs filed a patent application for the claims. (Ex. G-6, at 1.) Cliffs paid the

purchase price for issuance of a patent and on October 9, 1992, the First Half-Mineral Entry Final Certificate was issued. (ex. G-4, Appendix B.)

The contest was initiated when the Bureau of Land Management (BLM), on June 19, 1996, filed a complaint charging lack of discovery, within the limits of each claim, of an oil shale deposit sufficient to support a valid location on or before February 25, 1920, the lack of a present discovery of a valid deposit, and failure of the claimant and predecessors in interest to comply with 30 U.S.C. § 28 (1994).

A hearing was held before Judge Kuzmack on December 15 and 16, 1997, in Salt Lake City, Utah.

In his Decision, the Judge found (a) that there had been a lack of substantial compliance with 30 U.S.C. § 28 (1994) "to demonstrate a diligent good faith effort to develop each mining claim" (Decision at 8), (b) that the "resumption doctrine" was inapplicable to restore Cliffs' interest in the claims, and (c) that compliance with the $500 requirement (30 U.S.C. § 29 (1994)) does not satisfy the substantial compliance requirement of 30 U.S.C. § 28 (1994). (Decision at 10-11.)

On May 6, 1998, Cliffs filed in the Office of Hearings and Appeals' (OHA's) Salt Lake City Office a Petition for Stay of Judge Kuzmack's Decision "pending the outcome of appeals to determine finally whether the subject unpatented mining claims are valid, or are null and void." Discussing the standards for stay in 43 C.F.R. § 4.21, Cliffs filed the petition in order to maintain "the status quo of the virtually complete processing of Mineral Patent Application. UTU-65275." In light of our decision herein, the Petition for stay is denied as moot.

On May 12, 1998, BLM filed a Notice of Appeal from Judge Kuzmack's decision. Cliffs filed a Motion to Dismiss BLM's appeal as being late under 43 C.F.R. § 4.411(a). Cliffs asserts that BLM was served with Judge Kuzmack's Decision on April 10, 1998, and filed its Notice of Appeal on May 12, 1998 (a Tuesday), 32 days after service.

The relevant Departmental regulation provides that a notice of appeal from a BLM decision must be filed with BLM "within 30 days after the date of service [[of the decision]." 43 C.F.R. § 4.411(a); see 43 C.F.R. § 4770.3(a). Failure to timely file a notice of appeal requires dismissal of the appeal since, in that event, the Board is without jurisdiction to decide the appeal. See 43 C.F.R. § 4.411(c); Commission For The Preservation O Wild Horses, 133 IBLA 97 (1995)[a] and cases there cited.

According to the return receipt in the file, BLM received Judge Kuzmack's Decision on April 10, 1998, which began the running of the appeal period. See 43 C.F.R. § 1810.2(b); Victor M. Onet, Jr., 81 IBLA 144, 146 n. 2 (1984);[b] Lloyd M. Baldwin, 75 IBLA 251, 253 (1983).[c]

The regulations provide a 10-day grace period for filing a notice of appeal whereby an appeal will be deemed timely filed when the notice "is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of

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[a] GFS (MISC) 33 (1995)

[b] GFS (MIN) 93 (1984)

[c] GFS (O&G) 271 (1983)

the period in which it was required to be filed." 43 C.F.R. § 4.401(a). BLM's Notice of Appeal contains a handwritten note "Rec'd in OHA 5/12/98." The certification of service attached to the Notice of Appeal states that it was "Hand Carried" to the addressees. Accordingly, though BLM's Notice of Appeal was filed within the 10-day grace period, it was not transmitted before the end of the original appeal period and must therefore be dismissed as untimely. See Ilean Landis, 49 IBLA 59, 62 (1980).[d1]

Proceeding to the merits, Cliffs challenges that part of Judge Kuzmack's Decision dealing with lack of substantial compliance with statutory assessment work requirements.

The Judge found from the evidence that no assessment work affidavits were filed and no assessment work performed for a 47-year period, from July 1, 1931, through September 1, 1977, except that assessment work was performed in 1975. (Tr. 43-44, 266-67.) The Judge observed that Cliffs did not attempt to rebut this evidence and agreed with it in its patent application. In a document entitled "Description of Workings And Improvements" between 1918 and 1988, no activities are listed for the years from 1931 through 1977. (Ex. G-6 at Ex. M.) The Judge found that assessment work was properly performed for the years 1918 through July 1, 1930, and for the assessment year ending on September 1, 1978, through the assessment year ending on September 1, 1992. He concluded, however, that the failure to perform

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[4] GFS (O&G) 138 (1980)

[1] BLM filed no statement of reasons (SOR), nor an answer to Cliffs' SOR.

assessment work for 47 of 70 years demonstrated a lack of good faith in developing each of the claims and constituted a showing that Cliffs "has not substantially complied with the requirement of performing at least $100 of assessment work per year for each claim." (Decision at 8.)

Relying on United States v. Herr, 130 IBLA 349, 101 I.D. 113 (1994),* the Judge rejected Cliffs' claim that even though a claimant performed no assessment work for a time, the claim may be revived by the claimant's resumption of assessment work regardless of intervening rights which attached during the period when no assessment work was performed. (Decision at 9.)

Finally, quoting from Jerry D. Grover d.b.a. Kingston Rust Development, 139 IBLA 178, 181-82 (1997),† the Judge held that compliance with the $500 requirement (30 U.S.C. § 29 (1994)) was not "substantial compliance" with assessment work requirements.

Cliffs challenges the Judge's conclusion that lack of performance of assessment work in the years between 1930 and 1974 rendered the claims null and void. Cliffs asserts that the Judge failed to consider "the possibility of an exemption from the requirement to perform annual assessment work on oil shale mining claims based upon 1930 and 1935 U.S. Supreme Court decisions and Department of Interior acquiescence in those decisions since 1935." Further, Cliffs states that at the hearing it introduced testimony and evidence on this point. (SOR at 4.)

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* GFS (MIN) 63 (1994)

† GFS (MIN) 75 (1997)

Cliffs cites Ex. R-24 (Affidavit of William T. Schwartz) and Tr. 208-18.

At Tr. 210-18, Cliffs' president, Gary D. Aho, testified with respect to two cases, Wilbur v. Krushnic, 280 U.S. 306 (1930), and Ickes v. Virginia-Colorado Development Co., 295 U.S. 639 (1935). Aho gave his interpretation of these cases as holding that "the Government could not take away an oil shale claimant's rights for lack of assessment work, and that the Claim owner was entitled to resume assessment work at, at his, at any time he wanted to * * * ." (Tr. 210.)

William T. Schwartz is an attorney and a former president of Utah Shale and Oil Corporation. In his affidavit, he expressed his opinion that the Government had no right to challenge oil shale placer claims for failure of the locator to perform assessment work. (Ex. R-24.)

Cliffs characterizes the evidence outlined in the previous two paragraphs as a "widely known 'exemption' from performing annual assessment work." (SOR at 5.)

Cliffs asserts that the effect of United States v. Herr, supra, is "to retroactively wipe out currently maintained oil shale claims [which] does not meet any test of propriety, necessity or fairness." (SOR at 9.) Cliffs asserts that the Board erred when it stated in Herr that Hickel v. Oil Shale Corp., 400 U.S. 48 (1970), marked the demise of the resumption doctrine. (SOR at 10-11.)

Next, Cliffs contends that the critical date for determining the validity of a mining claim where a numeral patent application has been filed is the date when the First Half-Mineral Entry Final Certificate was issued, in this case, October 9, 1992. Cliffs states that the applicable

guidance is found in proposed rules "Affecting Petroleum Placer Claims" published at 56 Fed.Reg. 938 (Jan. 9, 1991), and a December 16, 1988, Memorandum of the Director, BLM, providing guidelines on the processing of oil shale patent applications. (Exs. R-3 and R-2.)

The January 9, 1991, proposed regulation, 43 C.F.R. § 3851.3, provided:

(a) Failure of a mining claimant to comply substantially with * * * (30 U.S.C. § 28) shall render the mining claim subject to contest proceedings * * * if the mining claim was located for minerals of a type no longer subject to disposition under the mining law, * * * . In order to meet the requirement for substantial compliance, the claimant shall annually perform not less than $100 worth of labor or make improvements in such amount in an effort to develop a valuable mine. Resumption of qualifying assessment work, prior to the initiation of a challenge by the United States, is an absolute defense in a contest brought on that basis. This provision was not promulgated. While it is well established that the department is bound by its duly promulgated regulations, the same is not true of proposed regulations which have not been promulgated. The relevant regulation in effect from 1972 provided:

> (a) Failure of a mining claimant to comply substantially with the requirement of an annual expenditure of $100 in labor or improvements on a claim * * * (30 U.S.C. § 28) will render the claim subject to cancellation.
>
> (b) Failure to make the expenditure or perform the labor required upon a location will subject the claim to relocation unless the original

> locator, his heirs and assigns, or legal representatives have resumed work after such failure and before relocation.

37 Fed.Reg. 17836 (Sept. 1, 1972). The preamble to this regulation states that:

> The purpose of the amendment is to revise the regulations in light of the principles set out in Hickel v. Oil Shale Corporation, 400 U.S. 48 (1970). The Department's regulations relating to assessment work on mining claims state that failure to perform the required assessment work relates solely to the right of possession between rival or adverse claimants to the same mineral land. The Supreme Court's decision in Hickel v. Oil Shale Corporation shows that the existing regulation is not consistent with the law.
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> * * *
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> [I]t is the Department's view that the proposed regulation correctly reflects the law as stated in that decision.

Therefore, the proposed amendment is hereby adopted without change * * * Id. Thus, the regulations recognized that oil shale mining claims were subject to invalidation for failure to substantially comply with the assessment work requirements long before issuance of the Herr decision.

In the October 1, 1993, revision, 43 C.F.R. § 3851.3(b) was amended as follows: "(b) Except as provided in § 3851.5 and subpart 3852, failure to perform the assessment work required under § 3851.1 causes the interest of the claimant(s) in the minerals subject to the mining laws to revert back to the public domain." No modification of this regulatory language has occurred since October 1, 1993.

The other item cited by Cliffs is the December 16, 1988, Memorandum from BLM's Director to the Colorado and Utah State Directors concerning the processing of oil shale placer applications. (Ex. R-2.) Included in the memorandum was a standard for the determination of the validity of such claims under which a claim was to be considered valid if it yielded 15 gallons or more of shale oil per ton of rock or 1,500 barrels or more per acre.

Finally, Cliffs argues that equitable title, which it claims vested when the First Half-Mineral Entry Final Certificate was issued in 1992, bars cancellation of the claims for failure to perform assessment work.

The issue in this appeal is whether the failure to perform assessment work renders these claims void. We hold that the Judge correctly so found.

The law applicable to the disposition of this appeal was stated in United States v. Herr, supra. The governing statutory provision, 30 U.S.C. § 28 (1994), calls for the expenditure of $100 in assessment work on or for the benefit of a mining claim each year until patent. Before patent can be obtained a claimant must have made improvements valued at $500 or more (30 U.S.C. § 29 (1994)), but the expenditure of $500 does not terminate the ongoing requirement for expenditure of $100 each assessment year specified in 30 U.S.C. § 28 (1994). Andrus v. Shell Oil Co., 446 U.S. 657, 658 n. 1 (1980). In United States v. Energy Resources Technology Land, Inc., 74 IBLA 117 (1983),[6] rev'd sub nom. Savage v. Hodel, Civ. No. 83-1838 (D.Colo., Nov. 19, 1983), vacated as moot, TOSCO

[6] GFS (MIN) 166 (1983)

Corp. v. Hodel, 826 F.2d 948 (10th Cir. 1987), we observed that the requirements of 30 U.S.C. § 29 (1994) (performance of $500 worth of assessment work as a prerequisite to the issuance of patent) and 30 U.S.C. § 28 (1994) (yearly performance of $100 worth of assessment work) are only tangentially related. We stated:

> [W]hile it is true that the requirement of section 29 can be satisfied by the performance of annual labor pursuant to section 28, the reverse is not possible. If it were, a claimant could do $500 worth of improvement on his claim during the first year of location – before the obligation to perform assessment work had even accrued – and then hold the unpatented claim for the next 50 years without ever performing any of the annual assessment work required by section 28. Clearly the 1872 Act did not contemplate that once a claimant had a accomplished $500 worth of work he would thereafter be excused from any further work. The Congress must have been aware that many claims would not be patented within 5 or 6 years after their location, and yet it required in section 28 that the annual labor be performed on each claim, "until a patent has been issued therefore * * * during each year." Nothing could be more plainly stated. Id. at 122.

In Jerry D. Grover d.b.a. Kingston Rust Development, supra, at 181-82, the Board held that while a claimant may have made improvements valued at $500 in order to obtain patent, such expenditure does not terminate the ongoing requirement for expenditure of $100 each assessment year in 30 U.S.C. § 28 (1994). Andrus v. Shell Oil Co., 446 U.S. 657, 658 n. 1 (1980); Hickel v. The Oil Shale

Corp., 400 U.S. 48, 54-55 (1970). In United States v. Herr, 130 IBLA 349, 357, 101 Interior Dec. 113 (1994),[h] we adhered to our prior decision in United States v. Energy Resources Technology Land, Inc., 74 IBLA 117 (1983),[i] rev'd sub nom Savage v. Hodel Civ. No. 83-1838 (D.Colo., Nov. 19, 1983), vacated as moot, TOSCO Corp. v. Hodel, 826 F.2d 948 (10th Cir. 1987), where we observed that the requirements of 30 U.S.C. § 29 (1994) (performance of $500 worth of assessment work as a prerequisite to the issuance of patent) and 30 U.S.C. § 28 (1994) (yearly performance of $100 worth of assessment work) are only tangentially related.

Deposits of oil shale on the public lands were withdrawn from location under the mining law by section 37 of the Mineral Leasing Act of 1920 which made oil shale deposits subject to leasing. 30 U.S.C. §§ 193, 241(a) (1994). Excepted from this provision were valid mining claims located before February 25, 1920, "thereafter maintained in compliance with the laws under which initiated." 30 U.S.C. § 193 (1994). Wilbur v. Krushnic and Ickes v. Virginia Colorado Development Corp., supra, are not controlling in this context. As we noted in Herr, supra, at 366, 101 I.D. at 122, the "resumption doctrine" articulated in Krushnic held that if a claimant does not do the necessary annual labor for a period of time, but resumes before another party's rights attach, nothing is lost by allowing the claimant to revive the claim with his labor, rather than formally relocating the claim. However, during the period that the claim has been abandoned and the land is

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[h] GFS (MIN) 63 (1994)

[i] GFS (MIN) 166 (1983)

subject to appropriation, if another partys' rights attach, the intervention of those rights deprives the claimant of the ability to reactivate the claim by resumption of work. The attachment of valid rights during a period of nonperformance of assessment work was recognized when the Supreme Court found in Hickel v. Oil Shale Corp., supra, that the United States is the beneficiary of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1994). With respect to Krushnic and Virginia-Colorado, the Hickel Court specifically held that "every default in assessment work does not cause the claim to be lost." However, "token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U.S.C. § 28 is not adequate to 'maintain' the claims within the meaning of § 37 of the Leasing Act." Id. at 57.

The intervening rights were created when the 1872 Mining Law was effectively amended in 1920 by making oil shale a leasable, rather than a locatable, mineral. For a period following this event the courts and the Department stated that a failure to do assessment work would not inure to the benefit of the Government.[2] However, this interpretation was abandoned after the Supreme Court handed down Hickel v. Oil Shale Corp., the Court concluding that "[Krushnic and Virginia-Colorado Development] must be confined to situations where there had been substantial compliance with the assessment work requirements of the 1872 Act." Hickel v. Oil Shale Corp., supra, at 57. We stand by our observation in Herr at 367,

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[2] See 30 Rocky Mt. Min. L. Inst. § 10.02[2] (1984), for a discussion of pre-Oil Shale Corp. decisions and regulations.

101 I.D. at 122, that after Hickel v. Oil Shale Corp., the resumption doctrine was no longer applicable to oil shale claims.

Cliffs' reference to 43 C.F.R. § 3851.3 is of no avail, since the resumption doctrine, proposed for inclusion in that regulation, was not promulgated. As noted earlier, the regulation as promulgated and carried forward in subsequent editions of the Code of Federal Regulations did not provide that the resumption doctrine was an "absolute defense" in a contest brought for failure to perform qualifying assessment work.

Finally, Appellant's assertion that issuance of the First Half-Mineral Entry Final Certificate bars cancellation for failure to do assessment work from 1931 to 1977 is without merit. The regulation at 43 C.F.R. § 3851.3(b) provides that "failure to perform the assessment work required under § 3851.1 causes the interest of the claimant(s) in the minerals subject to the mining laws to revert back to the public domain." The issuance of a First Half-Mineral Entry Final Certificate does not negate the effect of 43 C.F.R. § 3851.3(b). Such a certificate may constitute evidence that the entry had been allowed, which under 43 C.F.R. § 3851.5, would excuse the claimant from the necessity of performing assessment work. However, the claimant is excused only for that work which would have been required to have been performed "after" the date of allowance of mineral entry.

In Herr, supra, at 367-68, we stated: "Having concluded that [the Judge] properly found the claims void for failure to perform assessment work, we need not, and will not consider whether the claims are invalid for other reasons." This principle applies to the present case. Thus,

to the extent not discussed herein, Cliffs' other arguments are rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

James P. Terry
Administrative Judge
I concur:
C. Randall Grant, Jr.
Administrative Judge

[Logo] United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

[Illegible] South Temple, Suite 600
Salt Lake City, Utah 84111
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April 7, 1998

UNITED STATES OF AMERICA, Contestant v. CLIFFS SYNFUEL CORPORATION, Contestee	: UTU-75522 : Involving the Cliff Nos. 6, 8, 9 and 10 unpatented Oil Shale Placer Mining Claims situated in the SW¼ of sec. 31, T. 10 S., R. 25 E., SLM, Utah, and the SW¼NW¼ and the W½SW¼ of sec. 5, and the SE¼NE¼ and the NE¼SE¼ of sec. 6 and the NW¼ of sec. 8, T. 11 S., R. 25 E., SLM, Utah

Appearances: David K. Grayson, Esq., Salt Lake City, Utah, for Contestant

Robert G. Pruitt, Jr., Esq., Salt Lake City, Utah, for Contestee

Before: Administrative Law Judge Nicholas T. Kuzmack

DECISION

Contest UTU-75522 was initiated by the filing of a complaint by the Bureau of Land Management (BLM), United States Department of the Interior, charging that the oil shale placer mining claims Cliffs Nos. 6 and 8 through 10, held by Contestee Cliffs Synfuel Corporation (hereinafter collectively referred to as the "Cliffs claims"), are not valid mining claims and should be declared null

and void because (1) "there was no discovery within the limits of each claim of an oil shale deposit sufficient to support a valid location on or before February 25, 1920, or as a result of work begun prior to such date and diligently pursued[,]" (2) "there is presently no discovery within the limit of each claim of an oil shale deposit sufficient to support a valid location[,]" and (3) "the claimant of record and certain predecessors in interest failed to comply with the requirements of 30 U.S.C. [§] 28."

A hearing was held on December 15 and 16, 1997, in Salt Lake City, Utah. The record contains exhibits that are extensive in number and length. I had ample time and opportunity to observe the five witnesses who testified at the hearing. I observed nothing that called into question the credibility of any witness.

The parties filed post hearing briefs, in which they included legal arguments, but did not include proposed findings of fact. Having reviewed and considered all evidence and briefs, and for the reasons set forth below, I must conclude that the contested claims are invalid for failure to substantially comply with the annual assessment work requirement of 30 U.S.C. § 28.[1]

Statement of Facts

The Cliffs claims are located in the Bonanza Dragon Mining District, Uintah county, Utah, encompassing a total of 520 acres (Ex. G-6, p. 1). The Cliffs claims were

[1] All references to the United States Code are to the 1994 edition unless otherwise noted.

located on September 14, 1917 (Ex. G-6, p. 9) and that location was amended on September 15, 1989, reducing the claim areas for Cliffs No. 9 from 160 acres to 120 acres and Cliffs No. 10 from 160 acres to 80 acres (Ex. G-6, pp. 13-14). There is no dispute that cliffs Synfuel Corporation (Cliffs) acquired ownership of the claims from Standard Oil of Ohio in 1986 (Aho, Tr. 235; Ex. G-6, at exhibit C).

On March 22, 1989, cliffs filed a patent application for the claims (Ex. G-6, p. 1). There is no dispute that Cliffs properly posted and noticed the patent application and, by October 9, 1992, when the first half of the Final Certificate was issued, Cliffs had paid all the applicable fees including the purchase price for issuance of a patent (Ex. G-4, Appendix B). The complaint challenging the validity of these claims was filed on June 19, 1996.

The Cliffs claims are located in the Green River Formation with exposures of the Parachute Creek Member. The geology of the Green River Formation, Parachute Creek Member, is essentially undisputed (Sokolosky, Tr. 27-32).

The Supreme Court has defined oil shale as "sedimentary rock containing an organic material called kerogen which, upon destructive distillation, produces a substantial amount of oil." *Andrus v. Shell Oil Co.*, 446 U.S. 657 659 n. 3 (1980). According to United States Geological Survey (USGS) Circular 523, *Organic-Rich Shale of the United States and World Land Areas* (1965), the Green River Formation contains 90% of the "known resources" of oil shale in the United States in terms of gallons of oil equivalent, 75% of the "known resources" of oil shale in the world, and essentially all of the oil shale resources in

the United States classified as "recoverable under present conditions."

According to USGS Bulletin 691-B" * * * it is estimated that the Utah portion of the Basin alone contains sufficient shale to produce 42,800,000,000 barrels of crude oil * * * ."[2] (Ex. G-6, at exhibit H, p. 2)

Prior to 1920, oil shale claims were located in the same manner as mining claims of other minerals. Unpatented mining claims were recognized as property interests, entitling the claimant to exclusive possession of his claim for mining purposes. This possessory right could be changed to a fee simple interest if and when the claim was patented. The Mineral Lands Leasing Act of 1920, 30 U.S.C. § 181 *et seq*, " * * * removed oil shale lands from subsequent private appropriation under the mining laws and provided instead for a policy of leasing oil shale lands from the government * * * ." Section 37 of the Act (the Savings Clause), 30 U.S.C. § 193, provides a mechanism for preservation of previous claims, if maintained, under the applicable mining laws. *TOSCO*, 611 F.Supp. at 1147.

DISCUSSION

I.

DISCOVERY

BLM alleges that the claims are invalid because none of the claims contained a discovery of valuable mineral

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[2] For an extensive and informative discussion of the creation of the Green River Formation, see Chief Judge Finesilver's decision in *TOSCO v. Hodel*, 611 F.Supp. 1130, 1155-56 (D.C. Colo. 1985), *vacated as moot*. 826 F.2d 948 (10th Cir. 1987) (Ex. R-32).

deposit either on the date of withdrawal of the lands from mineral entry or at present (which is taken to mean at the date of issuance of the first half of the final certificate). The discovery of a valuable mineral deposit is a prerequisite to a mining claim being found valid. 30 U.S.C. § 22 *et seq.*; *United States V. Burt*, 43 IBLA 363, 366 (1979). The discovery of a valuable mineral deposit must exist at the date of withdrawal and at the date of issuance of the Final Certificate. *United States v. Collard*, 128 IBLA 266, 268 (1994).

When the Government contests the validity of a mining claim, it must make a prima facie case of invalidity, whereupon the burden shifts to the claimant to overcome the Government's prima facie case by a preponderance of the evidence as to those matters placed in issue by the Government. *United States v. Springer*, 491 F.2d 239, 242 (9th Cir. 1974) *cert. denied*, 419 U.S. 834 (1974); *United States v. Hooker*, 48 IBLA 22, 26-27 (1980). Although the claims are found invalid herein for failure to substantially comply with the annual assessment work requirement, it is necessary to address this remaining charge of lack of discovery because all questions should be addressed in a contest of claims for which a patent application is pending. *Id.* at 27.

The standard utilized to determine whether a discovery of a valuable mineral deposit has been made is the "prudent man test." *United States v. Coleman*, 390 U.S. 599 (1968). Accordingly, there must be found within the limits of the contested mining claim mineral of such quality and quantity as to justify a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. *Converse v. Udall*, 399 F.2d 616 (9th Cir.

1968), *cert. denied*, 393 U.S. 1025 (1969); *United States v. Edeline*, 39 IBLA 236, 238 (1979).

The "prudent man test" consists of two elements, a physical finding element and a value element. A physical finding of mineralization must be made within the limits of the claim and the mineral indications of value (quantity and quality) must be such as to warrant a prudent man in the further expenditure of time and money with a reasonable prospect of success. *See Freeman v. Summers*, 52 L.D. 201 (1927).

The value element of the test has been defined to require a showing that the claimed mineral is capable of extraction, removal and marketing at a profit, the so-called "marketability test." *Hooker*, 48 IBLA at 23-29. Application of the marketability test presupposes the established existence of a mineral deposit and is utilized as an aid in determining whether it is a valuable mineral deposit such that a reasonable prospect exists for its successful exploitation. *United States v. White*, 118 IBLA 266, 312 (1991).

Oil shale has historically been treated differently by the Department of the Interior than other minerals. As stated by Judge Seth in *Shell Oil Co, v. Andrus*, 591 F.2d 597 (10th Cir. 1979), *aff'd, Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980):

> The record before us does demonstrate that the value element attributed to substantial oil shale deposits to support claims was expressly treated differently than for metallic minerals by the Department of the Interior for the period 1915 to 1960. **This was clearly the case as to the Green River Formation on which the subject oil shale claims are**

> **located.** The mining laws were thus interpreted differently for oil shale by departmental practice, official instructions and decisions.
>
> * * *
>
> The Department by 1920 had thus determined that oil shale deposits, if demonstrated to contain sufficient oil, were "valuable mineral deposits" although there was no immediate market.

Id. at 599-600 (emphasis added).

BLM offers no evidence and does not argue that Cliffs did not meet the first element of the prudent man test. In fact BLM concedes that there was a physical finding of mineralization and that there was exposure prior to 1920 and at present. On page 2 of his Validity Examination report (Ex. G-4) the BLM examiner, Mr. Sokolosky, states that:

> A natural exposure of that portion of the Parachute Creek Member of the Green River Formation at or above the Mahogany Bed (the rich oil shale bed of the Green River Formation) has been shown to exist on each of the applied for claims which only satisfies the physical finding aspect of discovery.

Therefore the physical finding element of the prudent man test has been satisfied for each claim

BLM's argument is that Cliffs failed to meet the value element of the prudent man test by failing to demonstrate the marketability of the oil shale in and before 1920 and at present. It is clear that despite the general applicability of the present marketability test to other minerals, the Supreme Court, in *Andrus v. Shell Oil Co.*, 446 U.S. at 673 n. 2, rejected that test for oil shale, stating that both Congress and the Interior Department have treated oil

shale as a valuable mineral since 1920 and 1927 respectively. Therefore, BLM's reliance on the "marketability test" is misplaced.[3]

Supreme Court and Departmental precedent make clear that the prospective value of oil shale is not open to challenge, and that such value satisfies the value element of the test for discovery, provided there is a sufficient quantity of oil shale within each of the subject claims. Given that there are undisputedly sufficient quantities of oil shale on each claim, Cliffs has met the discovery requirements for oil shale both at the date of withdrawal and the date of issuance of the first half of the Final Certificate.

Although a discovery is recognized within the limits of each of Cliffs' placer mining claims, any 10-acre tract which is not mineral in character is null and void. *United States v. McCall*, 7 IBLA 21, 79 I.D. 457, *aff'd*, Civ. No. 76-155 (D. Nev. Nov. 4, 1977), *aff'd*, 628 F.2d 1185 (9th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981). However, there are no such tracts on Cliffs' claims, as Mr. Sokolosky testified that Cliffs met the requirements of the "10-acre rule" in that there was sufficient evidence to engender the

[3] Cliffs offered unrebutted testimony that there was a market for oil and the pyridines, which would be produced from an oil shale mining operation, and that these minerals could be mined and marketed at a profit (Bunger, T. 389-402; Ex. R-36). Therefore, had proof of present marketability been necessary, Cliffs would have met its burden.

belief that the mineral (oil shale) occurs on each 10-acre subdivision.[4]

II.

ASSESSMENT WORK

A.

LACK OF SUBSTANTIAL COMPLIANCE

BLM's third charge, as stated in its complaint, is that the claims are invalid because "the claimant of record and certain predecessors in interest failed to comply with the requirements of 30 U.S.C. [§] 28".[5] Under section 28, Cliffs was required to annually perform $100 worth of assessment work per claim until the date of issuance of the first half of the Final Certificate. *United States v. Mineo (On Reconsideration)*, 130 IBLA 314, 317-18 (1994).

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[4] "Q. Okay. So that if the Court were to find that the deposit is valid, valuable, and the, the, and the discovery was made, would any of this ground, in your view, be non-mineral in character?

A. It would not. It would be considered as mineral in character. Sokolosky, Tr. 93.

[5] BLM argued in its Post Hearing Brief that the failure to follow the state law of Utah in filing proof of work done in compliance with the assessment work requirements caused the lapse of the mining claims in question. In keeping with the fact that the burden of proof is upon Contestant and that, prior to enactment of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771, there was no legal requirement to record affidavits or otherwise preserve documents demonstrating the performance of assessment work, BLM is in error. The filing of proof of work is prima facie proof that the work has been done, but proof of not filing is not proof that the work was not done. *See TOSCO*, 611 F.Supp. at 1188-89 (and authorities cited therein).

BLM offered evidence that no assessment work affidavits were filed and no assessment work was performed for a 47-year period: from the assessment year ending July 1, 1931, through the assessment year ending September 1, 1977 (Sokolosky, Tr. 43-44; Ex. G-4, p. 15, and Aho, Tr. 266-67). With the exception of testimony that assessment work was performed in 1975 (Aho, Tr. 267), Cliffs did not attempt to rebut this evidence, but rather, essentially agreed with it in its patent application (Ex. G-6, at exhibit M).

The parties further agree that assessment work affidavits were filed and at least $100 worth of work per claim per year was performed for the assessment year ending December 31, 1918, through the assessment year ending July 1, 1930, and for the assessment year ending September 1, 1978, through the assessment year ending September 1, 1992 (Aho, Tr. 267-280). However, BLM contends that the excavations and access road work performed by Cliffs and its predecessors during these periods does not qualify as assessment work.

Except in the statutory provisions concerning geological surveys, Congress has not specifically explained what will or will not constitute assessment work. However, the courts have fashioned general principles to be applied when determining whether work satisfies the assessment work requirement. These principles are: (1) the work must be performed in good faith, (2) the work must tend to develop that claim, and (3) the work must tend to directly facilitate the extraction of minerals from that claim. *See* 2 *Am. L. of Mining* § 45.04[5][a].

One problem with this approach in defining qualifying assessment work for oil shale claims is that the commercial production of oil from oil shale has not been feasible since the statutes controlling oil shale claims were enacted. The "good faith" of any miner would be suspect over the long period in which the contested claims have existed without being mined. However, Cliffs offered unrebutted evidence that it was involved in many oil shale projects over the last 25 years (Aho, Tr. 187, 231, 281-287, and Raymond, Tr. 338-342), took part in several studies of oil shale mining (Aho Tr. 282), spent a large amount of money to get the claims to the patent stage (Aho, Tr. 309), and holds title or patents on some 17,000 acres in the immediate vicinity and adjoining areas (Aho, Tr. 311). While Cliffs does not claim this work as assessment work, however, it is evidence that tends to support a finding of good faith.

BLM alleges that the excavations conducted between 1918 and 1930 were only for the purpose of obtaining samples of oil shale for testing by the original holders of the claims (Ex. G-4, p. 17). The fact that the work was exploratory in nature is not disqualifying. *See Standard Shales Products Company*, 52 L.D. 522, 524-526 (1928); 2 *Am. L. of Mining* § 45.04[5][c]. There was no proof offered by BLM that the excavations were not exploratory in nature. Cliffs offered proof that they were exploratory in nature. (Ex. G-6, at exhibits C, L & M). Therefore, the annual assessment work requirement for the assessment year ending December 31, 1918, through the assessment year ending July 1, 1930, was met.

BLM also disputes whether the construction and maintenance of roads on each of the claims in 1977 and thereafter meet the annual assessment work standard.

Citing *United States v. Smith*, 66 I.D. 169, 175 (1959), BLM argues that roadway work does not qualify as assessment work unless: "1) it is clearly shown that the roadway is associated with actual excavation, 2) the roadway is essential to the practical development of the claim, and 3) the roadway actually facilitates the extraction of minerals from the claim." The applicability of this three-prong test is questionable, as the holding in *Smith* was based upon the wording of a regulation governing whether a roadway qualifies as an improvement which satisfies the requirement under 30 U.S.C. § 29 that $500 worth of labor or improvements be made prior to patent. *See* 66 I.D. at 175 (citing 43 C.F.R. § 185.43(b), now found at 43 C.F.R. § 3861.2-3(b)). However, the second and third prongs of this test are very similar to the second and third principles generally applicable in determining whether work satisfies the $100 annual requirement under 30 U.S.C. § 28, *i.e.*, the work must tend to develop the claim and the work must tend to directly facilitate the extraction of minerals from that claim.

In any event, the access road work qualifies as assessment work under either the *Smith* test or the general principles. First, there is unrebutted evidence in the record that the access roads constructed on each of the claims lead to either drill holes or excavations (Ex. G-6, at exhibit M, figure 1). There is no evidence that the roads serve any other purpose or were not constructed in good faith. Second, the roads are essential to the practical development of the claims because they provide access to the excavations and drill holes, which are necessary to the development of a mine in that they provide information regarding the quality, quantity and parameters of the oil

shale deposits. Third, by allowing access to this information, the roads actually facilitate the extraction of minerals from the claims. Given the testimony of Mr. Aho that an underground mine is contemplated (Aho, Tr. 269-271, 311-312), the determination of the depth of the oil shale and an intimate knowledge of the overlying material is necessary in planning the extraction of the oil shale. Consequently, the annual assessment work requirement was met for the assessment year ending September 1, 1978, through the assessment year ending September 1, 1992.

In sum, BLM has proved by clear and convincing evidence that Cliffs has not substantially complied with the requirement of performing at least $100 of assessment work per year for each claim. On each of the claims, assessment work was not performed for approximately 47 years out of the 70 plus years in which the annual assessment work requirement applied. This performance is not sufficiently substantial to demonstrate a diligent good faith effort to develop each mining claim.

B.

RESUMPTION DOCTRINE

Cliffs relies on the "resumption doctrine" to combat the lack of proof of assessment work over a 46- or 47-year period. Their reliance is misplaced. The Department of Interior's position regarding the resumption doctrine is stated clearly in *United States v. Herr*, 130 IBLA 349, 101 I.D. 113 (1994).

The Board reasoned in *Herr* that

> the "resumption doctrine" held that failure to perform annual labor rendered a claim subject to loss through relocation by another claimant. The basis for this doctrine is both logical and simple. If a claimant does not do the necessary annual labor for a period of time, but resumes before another party's rights attach, nothing is lost by allowing the claimant to revive the claim with his labor, rather than formally relocating the claim. However, during the period that the claim has been abandoned and the land is subject to appropriation, and if another party's rights attach, the intervention of those rights deprives the claimant of the ability to reactivate the claim by resumption of work.
>
> The claimant's arguments on appeal that the resumption doctrine applies in this case must fail because valid rights have attached. Those rights were recognized in *Hickel v. Oil Shale Corp., supra,* when the Supreme Court recognized that the United States is the beneficiary of oil shale mining claims invalidated for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1988).
>
> The intervening rights were created when the 1872 Mining Law was effectively amended in 1920 by making oil shale a leasable rather than a locatable mineral. For a period following this event the courts and the Department stated that a failure to do assessment work would not inure to the benefit of the Government. This interpretation was abandoned after the Supreme Court handed down *Hickel v. Oil Shale Corp., supra*, and, following that decision, the resumption doctrine was no longer applicable to oil shale claims.

101 I.D. at 122.

Cliffs argues that the Board's interpretation of *Hickel* is not controlling for several reasons. First, they argue that its interpretation is erroneous, noting correctly that the *Hickel* decision did not address application of the resumption doctrine to Governmental contests or expressly overrule its prior decisions in *Wilbur v. Krushnic*, 280 U.S. 306, and *Ickes v. Virginia-Colorado Development Corp.*, 295 U.S. 639, applying the resumption doctrine against the Government. This argument is rejected. I am bound to follow the Board's interpretation of *Hickel* and may not disregard or overrule it. *United States v. Energy Resources Technology Land, Inc.*, 74 IBLA 117, 130 (1983), *rev'd sub nom. Savage v. Hodel*, Civ. No. 83-1838 (D. Colo., Nov. 19, 1983), *vacated as moot sub nom. TOSCO v. Hodel*, 826 F.2d 948 (10th Cir. 1987).

Cliffs argues that the decision in *Herr* was based on the use of false affidavits by Herr. This argument is a red herring. The point of law is clearly that it was Herr's failure to perform qualifying assessment work in specific years that invalidated the claims. The fact that there was a lack of evidence to support assessment work affidavits for the years 1981 through 1988 led to the conclusion that no assessment work was performed during those years. This conclusion supported a finding that the mining claimants had not substantially complied with the annual assessment work requirement.

The discounting of those affidavits, however, had no bearing upon the additional finding that the resumption doctrine did not apply. Despite the finding that the claimants had performed the required assessment work in 1989, the claims at issue were declared invalid because the Government's interest in the claims attached during the period of default and prior to the resumption of work.

C.

COMPLIANCE WITH $500 REQUIREMENT IS NOT SUBSTANTIAL COMPLIANCE

Cliffs urges me to follow the standard for substantial performance of assessment work set forth in *Marathon Oil Co. v. Lujan*, 751 F.Supp. 1454 (D. Colo. 1990). Even if I agreed with the holding in *Marathon* that "[c]ompliance with the $500 requirement set forth in 30 U.S.C. § 29 satisfies the substantial compliance requirements of section 28," I would have to follow the Board's decision to the contrary in *Jerry D. Grover d.b.a. Kingston Rust Development*, 139 IBLA 178, 181-82 (1997).

Further, the Department is not required to follow every unappealled decision rendered by a United States district court. *Edward N. O'Leary*, 132 IBLA 337, 249 n.1 (1995). The Board has refused to follow isolated decisions of Federal courts under circumstances where the effect of the decision could be extremely disruptive to existing Departmental policies and programs and where, in addition, a reasonable prospect exists that other Federal courts might arrive at a different conclusion. *Id.* Such circumstances arguably exist with respect to the cases cited by Cliffs, as their holdings or dicta are inconsistent with the line of Board decisions holding that the resumption doctrine does not apply to Governmental contests of oil shale claims. *See e.g.*, *Herr*, 101 I.D. at 122, *United States v. Ertl*, IBLA 85-27 (April 9, 1986) at 13; *United States v. Bohme*, 48 IBLA 267, 87 I.D. 248, 270 (1980); *rev'd sub nom. TOSCO v. Hodel*, 611 F. Supp. 1130 (D. Colo. 1985), *vacated as moot*, 826 F.2d 948 (10th Cir. 1987); *United States v. Weber Oil Co.*, 68 IBLA 37, 89 I.D. 538, 546-47 (1982), *rev'd sub nom. Equity Oil Corp. v. Hodel*, Civ. No. 83-F-1837 (D. Colo. Nov. 19, 1985); *vacated as moot sub*

nom. TOSCO v. Hodel, 826 F.2d 948 (10th Cir. 1987); *Energy Resources Technology Land, Inc.*, 74 IBLA at 123.

Conclusion

Based upon the foregoing, each of the contested claims is hereby declared null and void for failure to substantially comply with the annual assessment work requirement found at 30 U.S.C. § 28.

/s/ Nicholas T. Kuzmack
Nicholas T. Kuzmack
Administrative Law Judge

APPEAL INFORMATION

Any party adversely affected by this decision has the right to appeal to the Interior Board of Land Appeals. The appeal must comply strictly with the regulations in 42 C.F.R. Part 4 (see enclosed information pertaining to appeals procedures).

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CLIFFS SYNFUEL CORPORATION, a Utah corporation,

Plaintiff-Appellee,

v.

GALE NORTON, Secretary of United States Department of the Interior; NINA ROSE HATFIELD, Acting Director, Bureau of Land Management, United States Department of the Interior; SALLY WISELY, Director, Utah State Office, Bureau of Land Management, United States Department of the Interior; THE DEPARTMENT OF INTERIOR OF THE UNITED STATES,

Defendants-Appellants.

No. 01-4063

CRIPPLED HORSE INVESTMENTS, LP; ESTATE OF FREDERICK H. LARSON; PHILLIPS 66 COMPANY; EXXONMOBIL CORPORATION,

Amici Curiae.

ORDER

Filed August 1, 2002

Before **TACHA**, Chief Judge, and **ALDISERT**[*], and **SEYMOUR**, Circuit Judges.

Appellee Cliffs Synfuel Corporation's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Appellee's motion for withdrawal and substitution of counsel is granted. Robert G. Pruitt, Jr., Michael S. Johnson, and Shawn T. Welch are allowed to withdraw and Steven J. Lechner and William Perry Pendley are substituted as counsel of record for Appellee, Cliffs Synfuel Corporation.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ [Illegible]
Deputy Clerk

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[*] Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

UNITED STATES CODE ANNOTATED
TITLE 30. MINERAL LANDS AND MINING
CHAPTER 2 – MINERAL LANDS AND REGULATIONS IN GENERAL

§ 28. Mining district regulations by miners: location, recordation, and amount of work; marking of location on ground; records; annual labor or improvements on claims pending issue of patent; co-owner's succession in interest upon delinquency in contributing proportion of expenditures; tunnel as lode expenditure

The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the 10th day of May 1872, that is granted a waiver under section 28f of this title, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, $10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred

shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.

UNITED STATES CODE ANNOTATED
TITLE 30. MINERAL LANDS AND MINING
CHAPTER 3A – LEASES AND PROSPECTING PERMITS
SUBCHAPTER I – GENERAL PROVISIONS

§ 193. Disposition of deposits of coal, and so forth

The deposits of coal, phosphate, sodium, potassium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits in Lander, Wyoming, coal entries numbered 18 to 49, inclusive, shall be subject to disposition only in the form and manner provided in this chapter, except as provided in sections 1716 and 1719 of Title 43, and except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

EMS Transmission 12/16/88
Memorandum

To: State Directors – Colorado and Utah

From: Director

Subject: Processing of Oil Shale Patent Applications

Purpose

The purpose of this memorandum is to provide guidance for the disposition of mineral patent applications for oil shale placer mining claims. The timing of this guidance is prompted by the attached letter to Senator Melcher from Principal Deputy Assistant Secretary Cason. This letter also contains the standards by which the Bureau is to adjudge the existence of a valuable oil shale deposit, and whether there has been substantial compliance with assessment work requirements, including the application of the resumption principle of the mining law (30 U.S.C. §28).

Timing and Procedures

Work on the further processing of the pending patent applications is to commence as soon as possible. Applications should generally be processed in the order that they have been received, with the exception that where a mineral report on a claim group can be prepared without resort to additional field work the processing of that application should be a priority.

Because of the continuing Congressional interest in these oil shale claims, please notify the Director (100) prior to

the issuance of any patents. It will not be necessary to routinely supply documentation to the Headquarters Office of the proposed action. The decision to patent or contest mining claims remains delegated to State Directors.

To be able to respond to inquiries better in the Washington Office, please provide by December 23, 1988, your best estimate as to when the necessary mineral reports can be finalized for those patent applications for which the first part of the Final Certificate has already been issued, or for which some field work to verify discoveries and assessment work compliance has already been performed. We will rely upon the semi-annual patent application report to track the progress of the newer applications still undergoing adjudication.

Validity Standards

The standards to be applied in the preparation of mineral reports on these oil shale claims are as stated in the attached letter. While we are not required to have promulgated these standards as rules (because the conflicting IRLA precedents were mooted in the negotiated settlement of the *TOSCO v. Hodel* litigation) you should be aware that an effort to publish draft regulations is indeed underway. The preamble to the proposed rules describes in detail the rationale for these standards.

Attachment
Letter of 12/07/88 to Chairman Melcher

signed by: A.A. Sokoloski
Deputy Assistant Director – Energy
and Mineral Resources (Solids)

Honorable John Melcher
Chairman, Subcommittee on Mineral Resources
Development and Production
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is to inform you that the Department of the Interior intends to begin the further processing of oil shale mining claims patent applications pending in the Colorado and Utah State Offices of the Bureau of Land Management (BLM). We have decided to end our self-imposed delay on further processing these patent applications, including verification of whether the claims in question meet the test of discovery of a valuable mineral deposit within the meaning of the mining laws, and whether such claimants have substantially complied with the assessment work requirements.

We had hoped to reach a consensus with Congress on these issues prior to deciding to go forward with the task of making these determinations. Now that the 100th Congress has adjourned without enacting oil shale legislation, the Department feels compelled to carry out its duties under the Mining Law of 1872 to adjudicate the validity of mining claims for which a mineral patent is sought. As you know, two of the applications in Colorado have been pending since 1982. Our policy will be to expeditiously process mineral patent applications and either issue patent to the successful claimant or contest the claims the BLM alleges to be invalid.

Our standards for the determination of validity of these oil shale claims shall be consistent with the statutes as

interpreted by the U.S. Supreme Court. The standard of discovery of a valuable oil shale deposit shall be:

> An exposure of the prospectively valuable rich beds of oil shale of the Green River Formation within the boundaries of the mining claim yielding 15 gallons or more of shale oil per ton of rock, in beds not less than one foot thick, yielding 1500 barrels or more per acre. Further, this standard may be met by an exposure of a marlstone tongue of the Green River Formation, yielding not less than three gallons of shale oil per ton of rock upon destructive distillation, inferred to connect to the uppermost strata of prospectively valuable rich beds of oil shale lying at depth within the boundaries of the mining claim, but the inferred connection of the qualifying marlstone tongue need not occur within the confines of the mining claim.

This standard was formulated in *Freeman v. Summers* (1927), and subsequently held to be the correct interpretation on discovery by the U.S. Supreme Court in *Andrus v. Shell Oil Co.* (1980).

The standard for measuring substantial compliance with assessment work requirements of the mining law shall be:

> A mining claimant shall annually perform not less than $100 worth of labor or make improvements valued at not less than $100 per claim in an effort to develop a valuable mine. A lapse of qualifying assessment work performance of two or more years duration is sufficient basis upon which the United States may contest the validity of the mining claim, except that resumption of assessment work prior to the initiation of a

challenge is an absolute defense in a contest brought on that basis.

This criterion is the result of several cases interpreting the Federal Government's role in policing assessment work performance. In *Hickel v. TOSCO* (1970), the Court held that the United States could contest mining claims for which only insubstantial or "token" assessment work was alleged to have been performed, but let stand earlier rulings which greatly limit the basis upon which such challenge could be made. *Wilbur v. Krushnic* (1930) holds that the resumption principle of the mining law (30 USC §28) bars challenge of mining claims by the Government as well as by rival claimants after assessment work is resumed. *Virginia-Colorado Development Corp. v. Ickes* (1935) holds that a lapse of one year in duration is not sufficient to support a contest by the Government.

As always, we remain available to discuss our views on these issues. Should Congress continue to feel compelled to propose legislation to address oil shale claims, we would be pleased to participate in the process to ensure that reasonable, equitable legislation is forthcoming.

Sincerely,

signed by: James E. Cason
Principal Deputy Assistant Secretary –
Land and Minerals Management

dated: December 7, 1988